(2)

No. 95-809-CFX Title: Lockheed Corporation, et al., Petitioners
Status: GRANTED v.
Paul L. Spink

Docketed: November 24, 1995 Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Krischer,Gordon Eugene

Counsel for respondent: Traber,Theresa M.

Entry	Date	Note	Proceedings and Orders
1	Nov 24 1995	G	Petition for writ of certiorari filed. (Response due December 24, 1995)
3	Dec 21 1995	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
2	Dec 22 1995		Brief of respondents Paul L. Spink, et al. in opposition filed.
4	Dec 22 1995	G	Motion of Erisa Industry Committee, et al. for leave to file a brief as amici curiae filed.
5	Dec 22 1995	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
6	Jan 3 1996		DISTRIBUTED. January 19, 1996 (Page 2)
7	Jan 3 1996	X	Reply brief of petitioners filed.
8	Jan 19 1996		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.
9	Jan 19 1996		Motion of Erisa Industry Committee, et al. for leave to file a brief as amici curiae GRANTED.
10	Jan 19 1996		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
11	Jan 19 1996		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **
12	Feb 16 1996		SET FOR ARGUMENT MONDAY, APRIL 22, 1996. (3RD CASE).
13	Feb 21 1996		Joint appendix filed.
14	Feb 27 1996		Brief amicus curiae of Equal Employment Advisory Council filed.
15	Feb 29 1996		Brief of petitioners Lockheed Corporation, et al. filed.
16	Feb 29 1996		Brief amici curiae of American Academy of Actuaries, et al. filed.
18	Feb 29 1996		Brief amicus curiae of Erisa Industry Committee filed.
17	Mar 1 1996		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
20	Mar 1 1996		Brief amicus curiae of New England Legal Foundation filed.
21	Mar 1 1996		Brief amicus curiae of United States filed.
22	Mar 8 1996		CIRCULATED.
23	Mar 26 1996	G	Motion of the Solicitor General for leave to participate

2 pp

No. 95-809-CFX

Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument filed.
25	Mar 29 1996	X	Brief of respondents Paul L. Spink, et al. filed.
26	Mar 29 1996	X	Brief amicus curiae of National Employment Lawyers Association filed.
27	Mar 29 1996	X	Brief amicus curiae of Engineers and Scientists Guild, Lockheed Section filed.
28	Mar 29 1996	X	Brief amicus curiae of American Association of Retired Persons filed.
24	Apr 1 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
29	Apr 5 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
30	Apr 5 1996		Record filed.
		*	Original record proceedings United States District Court for the Central District of California (BOX).
31	Apr 12 1996	X	Reply brief of petitioners filed.
32	Apr 22 1996		ARGUED.

No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
vs.
PAUL L. SPINK,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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83

QUESTIONS PRESENTED

1. Whether, contrary to the holdings of nine other circuits, the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan.

2. Whether the Ninth Circuit correctly held that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA"), applies retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation, in the absence of any clear intent by Congress to impose retroactive liability for pension benefits.

PARTIES

The parties are Lockheed Corporation; Daniel M. Tellep; Robert A. Furman; Vincent N. Marafino; K.H. Anderson; L. Bernard; R.W. Berry; P.N. Braun-Agel; D.L. Bronco; R.H. Northcutt; W.E. Skowronski; A.G. Van Schaick; and W.T. Vincent, Petitioners; and Paul L. Spink, Respondent (on behalf of himself and similarly situated individuals).

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioners state that Lockheed Martin Corporation is the parent corporation of Lockheed Corporation and that Lockheed Martin Corporation and Lockheed Corporation have the following subsidiaries (other than wholly owned subsidiaries): Aeroplex of Central Europe, American Stone Company, Bahama Rock Limited, Bayou Mining, Inc., Central Rock Company, EO Systems International, Limited, Guangzhou Aircraft Maintenance Eng., Co., Ltd., Gulf Technology Systems Group, Hellenic Business Development & Investment Co., SA, Letlock Saudi Arabia, Lockheed Aircraft Argentina, SA, Lockheed Investment Holding Co., AS, Lockheed Khrunichev Energia Int'l, Inc., Lockheed Martin (UK) Limited, Martin Marietta Aggregates, Inc., Martin Marietta Magnesia Specialties Inc., Martin Marietta Materials Canada Limited, Martin Marietta Materials, Inc., Space Imaging, Inc., Standard Magnesia Limited, Superior Stone Company, Toshiba Electronic Systems Co., Ltd., Tusas Aerospace Industries, Inc., Western Investor Technology Group, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION BELOW HOLDING THAT LOCKHEED'S DESIGN OF THE EARLY RETIREMENT PROGRAM CONSTITUTES A PROHIBITED TRANSACTION AND BREACH OF FIDUCIARY DUTY DEPARTS FROM THE RULE FOLLOWED BY OTHER CIRCUITS. 7

A. The Ninth Circuit Improperly Imposed Fiduciary Standards Upon A Plan Sponsor When Adopting Eligibility Requirements For A New Plan Benefit . . 7

B. The Decision Below Conflicts With The Decisions Of Other Circuits 8

C. The Decision Below Is Wrong On The Merits 12

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *LANDGRAF V. USI FILM PRODUCTS*, BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT 16

A. The Language Of Section 9204(a)(1) Expressly Provides That Sections 9201 And 9202 Apply Prospectively 19

B. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Operates Retroactively 22

C. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only As Applied To Individuals Who Were Not Participants Before OBRA 1986 23

III. THE DECISION BELOW HAS IMPACT BEYOND JUST THE NINTH CIRCUIT, BECAUSE IT PUTS IN JEOPARDY MANY SOCIALLY BENEFICIAL VOLUNTARY EARLY RETIREMENT PROGRAMS AND WILL DISCOURAGE EMPLOYERS FROM ADOPTING SUCH PROGRAMS IN THE FUTURE 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases Page(s)

AARP v. EEOC,
655 F. Supp. 228 (D.D.C.), *rev'd*,
823 F.2d 600 (D.C. Cir. 1987) 18

Anderson v. John Morrell & Co.,
830 F.2d 872 (8th Cir. 1987) 11

Astor v. International Business Machines Corp.,
7 F.3d 533 (6th Cir. 1993) 15

Averhart v. U S West Management Pension Plan,
45 F.3d 1480 (10th Cir. 1994) 11

Belade v. ITT Corp.,
909 F.2d 736 (2d Cir. 1990) 10

Bell v. Trustees of Purdue University,
658 F. Supp. 184 (N.D. Ind. 1987),
remanded, 845 F.2d 1023 (7th Cir. 1988),
on remand, 761 F. Supp. 1360 (N.D. Ind.
1991), *aff'd*, 975 F.2d 422 (7th Cir. 1992) 18

Bob Jones University v. United States,
461 U.S. 574 (1983) 25

*Chevron U.S.A. Inc. v. Natural Resources
Defense Council*, 467 U.S. 837 (1984) 25

Cirillo v. ARCO Chemical Co.,
862 F.2d 448 (3d Cir. 1988) 15

Curtiss-Wright Corp. v. Schoonejongen,
___ U.S. ___, 115 S. Ct. 1223,
131 L. Ed. 2d 94 (1995) 7

Farr v. U S West, Inc.,
58 F.3d 1361 (9th Cir. 1995) 29

Fletcher v. Kroger Co.,
942 F.2d 1137 (7th Cir. 1991) 9

Ford Motor Co. v. Milhollin,
444 U.S. 555 (1980) 25

Harlan v. Sohio Petroleum Co.,
677 F. Supp. 1021 (N.D. Cal. 1988) 15

Hozier v. Midwest Fasteners, Inc.,
908 F.2d 1155 (3d Cir. 1990) 10

Izzarelli v. Rexene Prods. Co.,
24 F.3d 1506 (5th Cir. 1994) 10

Joanou v. Coca-Cola Co.,
26 F.3d 96 (9th Cir. 1994) 12, 29

Johnson v. Georgia-Pacific Corp.,
19 F.3d 1184 (7th Cir. 1994) 9, 13, 14

Landgraf v. USI Film Products,
___ U.S. ___, 114 S. Ct. 1483,
128 L. Ed. 2d 229 (1994) 6, 16, 22, 30

Lea v. Republic Airlines, Inc.,
903 F.2d 624 (9th Cir. 1990) 29

M&R Investment Co. v. Fitzsimmons,
685 F.2d 283 (9th Cir. 1982) 13

Madden v. ITT Long Term Disability Plan,
914 F.2d 1279 (9th Cir. 1990),
cert. denied, 498 U.S. 1087 (1991) 29

Mead Corp. v. Tilley,
490 U.S. 714 (1989) 25

Mongeluzo v. Baxter Travenol Long Term Disability Plan,
46 F.3d 938 (9th Cir. 1995) 29

Moore v. Reynolds Metals Co. Retirement Program,
740 F.2d 454 (6th Cir. 1984),
cert. denied, 469 U.S. 1109 (1985) 11

Musto v. American General Corp.,
861 F.2d 897 (6th Cir. 1988),
cert. denied, 490 U.S. 1020 (1989) 11

Orozco v. United Air Lines, Inc.,
887 F.2d 949 (9th Cir. 1989) 29

Phillips v. Amoco Oil Co.,
799 F.2d 1464 (11th Cir. 1986),
cert. denied, 481 U.S. 1016 (1987) 11, 14

Richardson v. Pension Plan of Bethlehem Steel Corp., ___ F.3d ___,
1995 U.S. App. LEXIS 28837
(9th Cir. Oct. 17, 1995) 29

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 7

Siskind v. Sperry Retirement Program, Unisys,
47 F.3d 498 (2d Cir. 1995) 10

Sutton v. Weirton Steel Division,
724 F.2d 406 (4th Cir. 1983),
cert. denied, 467 U.S. 1205 (1984) 10

Williams v. Caterpillar, Inc.,
944 F.2d 658 (9th Cir. 1991) 29

Statutes

Internal Revenue Code

§ 410(a)(2), 26 U.S.C. § 410(a)(2) 17
§ 411(b)(1)(H), 26 U.S.C. § 411(b)(1)(H) 24
§ 411(b)(1)(H)(v), 26 U.S.C. § 411(b)(1)(H)(v) . . . 25

Age Discrimination in Employment Act

§ 4(i)(1), 29 U.S.C. § 623(i)(1) 1, 18
§ 4(i)(7), 29 U.S.C. § 623(i)(7) 25

Employment Retirement Income Security Act

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) 1, 3, 4
§ 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A) 7
§ 202(a)(2), 29 U.S.C. § 1052(a)(2) 17, 21
§ 203(a), 29 U.S.C. § 1053(a) 7
§ 204(a), 29 U.S.C. § 1054(a) 7
§ 204(b)(1)(H)(i),
29 U.S.C. § 1054(b)(1)(H)(i) 1, 18
§ 204(b)(1)(H)(vi),
29 U.S.C. § 1054(b)(1)(H)(vi) 25
§ 204(g), 29 U.S.C. § 1054(g) 7
§ 406, 29 U.S.C. 1106 13
§ 406(a), 29 U.S.C. § 1106(a) 13
§ 406(a)(1), 29 U.S.C. § 1106(a)(1) 1, 8
§ 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D) . . . 6,8,12,13
§ 502(e)(2), 29 U.S.C. 1132(e)(2) 29

Omnibus Budget Reconciliation Act of 1986

§ 9201 1
§ 9202(a)(2) 1
§ 9203 1
§ 9204 1
§ 9204(a) 5, 22
§ 9204(a)(1) 21, 22
§ 9204(b) 21, 22

Administrative Interpretations

43 Fed. Reg. 43,264 (1978) 18
53 Fed. Reg. 11,877 (1988) 24

Prop. Treas. Reg. § 1.411(b)-2 24
Prop. Treas. Reg. § 1.411(b)-2(f)91)(ii) 24

Temp. Treas. Reg. § 1.411(a)-4T(c) 15

Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) 15
Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(B) 15
Treas. Reg. § 1.401(k)-1(a)(3)(iv) 26
Treas. Reg. § 1.411(a)-4(c) 15

T.A.M. 9516005 (Dec. 22, 1994) 15

Legislative History

H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023 23

S. Rep. No. 101-79, 101st Cong., 1st Sess. (1989) 28

S. Rep. No. 101-263, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509 . . . . 15, 18

Other Authorities

General Accounting Office, *Downsizing Strategies Used in Selected Organizations*, GAO/GGD 95-54 (1995) 27

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Grant, The "Open Window" -- Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10 (March 1991) 28

Hewitt Associates, *Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans* (1992) 27

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully submit that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 616, and is reprinted in the Appendix hereto at 1a-21a. The court's denial of rehearing, App. 22a, is unreported. The district court's opinion is unofficially reported at 15 Employee Benefits Cas. (BNA) 2242 and 61 Empl. Prac. Dec. (CCH) ¶ 42,094, and is reprinted in the Appendix at 23a-35a.

JURISDICTION

The court of appeals' opinion was filed on July 18, 1995. A timely petition for rehearing was denied on September 1, 1995. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are involved in this case: ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1); § 9201 of OBRA 1986, 29 U.S.C. § 623(i)(1); § 9202(a)(2) of OBRA 1986, 29 U.S.C. § 1054(b)(1)(H)(i); § 9203 of OBRA 1986, 100 Stat. 1979 (1986); and § 9204 of OBRA 1986, 100 Stat. 1979-80 (1986), *codified at* 29 U.S.C. § 623 note. The pertinent text of these statutes is set forth in the Appendix at 36a-39a.

STATEMENT OF THE CASE

Factual Background. Petitioner Lockheed Corporation ("Lockheed") sponsors a pension plan, the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan"). Prior to 1986, Lockheed was permitted, by the express terms of ERISA and the ADEA, to lawfully exclude from Plan participation those employees who were hired within five years of normal retirement age. Lockheed's Plan contained such a provision, which stated that an employee who was more than 60 years old when hired was not eligible to participate in the Plan. Congress eliminated this exclusion from pension plan participation when it enacted OBRA 1986, with the proviso that the new rule would not take effect until 1988.

Respondent Paul L. Spink was first employed by Lockheed in 1939, and then intermittently through 1950. After an interim of nearly 30 years, during which he worked for other employers in the defense industry, Lockheed again hired respondent in 1979, at age 61. Respondent did not become a Plan participant at this time, because he was over 60 years old. Instead, respondent first became a Plan participant on December 25, 1988, when OBRA 1986 took effect with respect to Lockheed's Plan.[1]

In 1990, Lockheed offered a voluntary early retirement window program for the purpose of reducing the size of its workforce in connection with a drastic reduction in Lockheed's business operations in Southern California. In order to implement this decision, Lockheed's Board of Directors amended the terms of the Plan to provide additional retirement benefits beyond the benefits to which employees would otherwise be entitled, for those employees who qualified and volunteered to leave their Lockheed

[1] The provisions of OBRA 1986 in question applied generally to plan years beginning on or after January 1, 1988. Lockheed's first Plan year following January 1, 1988, commenced on December 25, 1988.

employment. Eligibility for these enhanced early retirement benefits was made subject to certain conditions specified in the Plan amendment, one of which was that each retiring employee seeking to take advantage of the program was required to sign an agreement releasing Lockheed from any claims relating to the employee's decision to elect early retirement.

Respondent did not participate in the special early retirement window program, and therefore never signed any release. Instead, respondent worked until June 30, 1990, when he voluntarily retired from Lockheed. Respondent concedes that Lockheed has complied with the written terms of the Plan in calculating his pension benefits at all times since his retirement. App. at 25a n.1.

The complaint. The district court complaint, filed by respondent on behalf of himself and as representative of a class of persons similarly situated, challenged both the release requirement of the 1990 early retirement window program, as well as Lockheed's decision not to retroactively credit respondent and the putative class members for pre-1988 employment when calculating pension benefit accruals. On the challenge to the design of the 1990 early retirement program, the complaint alleged that Lockheed, and individual members of its Board of Directors, breached the fiduciary duty provisions of ERISA by amending the Plan to require a release as a condition of receipt of the additional pension benefits. This claim was premised on the allegation that Lockheed acted not only as the Plan sponsor, but also as a "fiduciary" within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

On the second point -- whether OBRA 1986 requires retroactive pension benefit accruals -- the complaint alleged that Lockheed's decision not to retroactively accrue pension benefits for pre-1988 employment service violated the ADEA and ERISA. Respondent did not dispute the proposition that, under the law that

applied to Lockheed prior to December 25, 1988, the Plan lawfully excluded from participation individuals such as himself who were hired within five years of normal retirement age, and who had not accrued any pension benefits under the Plan prior to that date. Nonetheless, respondent alleged that OBRA 1986 required Lockheed to provide retroactive benefit accrual for his pre-1988 employment upon his becoming a Plan participant in 1988.

The district court's decision. The district court, in a decision by Judge Stephen V. Wilson, granted Lockheed's Rule 12(b)(6) motion to dismiss the complaint prior to class certification. The district court's jurisdiction was based upon § 502(a) of ERISA, 29 U.S.C. § 1132(a). The court rejected respondent's argument that Lockheed had breached a fiduciary duty or engaged in a prohibited transaction under ERISA by amending the Plan to condition eligibility for the enhanced early retirement benefits upon a release of claims. The court noted that "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." App. at 29a. The court concluded that "the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan . . . " App. at 30a. Because Lockheed had acted in a corporate, rather than fiduciary, capacity when amending the Plan, the court concluded that "[Lockheed's] actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed." App. at 31a.

The district court also held that the "plain language of OBRA 1986 . . . defeats Plaintiff's claim" for retroactive benefit accrual. App. at 26a. In finding that OBRA 1986 had prospective effect only, the court observed that OBRA 1986 expressly provided that eligibility for pension plan participation for employees hired

within five years of normal retirement age (and thus lawfully excluded from a plan) was to begin only with plan fiscal years commencing on or after January 1, 1988, which in Lockheed's case was December 25, 1988. App. at 27a. The court then concluded that "because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual." App. at 27a. The court also noted that "the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion," since § 9204(a) of OBRA 1986 expressly limited application of these amendments to Plan years beginning on or after January 1, 1988. App. at 27a-28a. Given this "unambiguous statutory language," the court concluded that "Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation." App. at 28a.

The court of appeals decision. The court of appeals, in a decision authored by Judge Melvin Brunetti and joined by Judges Stephen Reinhardt and Dorothy W. Nelson, reversed the decision of the district court on both of respondent's claims. First, it held that OBRA 1986 applies retroactively. Thus, the court determined that OBRA 1986 requires employers not only to permit employees who had been hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively "include pre-enactment service years in calculating accrued benefits." App. at 8a n.1. In reaching this conclusion, the court expressly disagreed with the administrative interpretation of the Internal Revenue Service ("IRS"), the agency charged by Congress with interpreting OBRA 1986, that there is no requirement for retroactive pension benefit accruals in the case of individuals who had not previously been participants. App. at 13a n.3.

The court of appeals also held that Lockheed breached its fiduciary duty under ERISA by amending its Plan to require a

release of claims as a precondition to participation in the additional benefits created by the early retirement window. App. at 13a-18a. Although the court acknowledged the abundant case law holding that Lockheed has "extensive" freedom to amend its Plan, it held that Lockheed was "not free to disregard the prohibitions of ERISA." App. at 16a. Specifically, the court concluded that, by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under § 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), because the Plan amendment "provided for use of Plan assets to purchase a significant benefit for Lockheed." App. at 18a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision errs on two significant issues of law, both of which have nationwide impact. First, by holding a pension plan sponsor to fiduciary standards when adopting eligibility criteria for a new pension benefit, the decision conflicts with the rule followed by every other circuit to consider the issue. Second, by holding that the benefit accrual provisions of OBRA 1986 apply retroactively, the decision not only deviates from this Court's recent decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), but also conflicts with the administrative interpretation of the statute by the IRS, the agency charged with administering OBRA 1986. Both errors will have a substantial adverse impact on employers and pension plan sponsors, which routinely administer pension plans in the same manner as Lockheed. Because these widely accepted practices have now been branded unlawful by the Ninth Circuit, further review is plainly warranted.

I. THE DECISION BELOW HOLDING THAT LOCKHEED'S DESIGN OF THE EARLY RETIREMENT PROGRAM CONSTITUTES A PROHIBITED TRANSACTION AND BREACH OF FIDUCIARY DUTY DEPARTS FROM THE RULE FOLLOWED BY OTHER CIRCUITS.

A. The Ninth Circuit Improperly Imposed Fiduciary Standards Upon A Plan Sponsor When Adopting Eligibility Requirements For A New Plan Benefit.

This Court has recognized that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995). Pension plans are also freely amendable, so long as the plan sponsor satisfies the substantive conditions established by ERISA such as minimum participation, funding, and vesting requirements.[2] *Id.*; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). No argument has ever been made that the 1990 amendment to Lockheed's Plan violated any of these substantive requirements: the Plan amendment did not deny respondent the right to continued participation in the Plan, nor did it diminish any of his vested pension benefits, nor did it cause the Plan to become underfunded. Instead, the Plan amendment provided *additional* pension benefits to eligible participants who voluntarily elected early retirement. The amendment therefore falls

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[2] These substantive requirements are set forth in 29 U.S.C. § 1052(a)(1)(A) (minimum participation requirements); 29 U.S.C. § 1053(a) (minimum vesting requirements); 29 U.S.C. § 1054(a) (minimum accrual standards). *See also* 29 U.S.C. § 1054(g) (prohibiting certain types of plan amendments, but not the type at issue here). The court of appeals did not hold that Lockheed's Plan amendment violated any of these provisions.

within the broad latitude accorded to plan sponsors to freely amend their plans so long as ERISA's minimum standards are satisfied.

The court of appeals disregarded this basic principle, holding instead that Lockheed's amendment of the Plan to provide additional pension benefits was a fiduciary act that caused the Plan to engage in a prohibited transaction.[3] App. at 18a. This unprecedented holding departs from the text of ERISA, as well as the uniform interpretation of the statute adopted by the other circuits and the administrative agencies charged with enforcing ERISA, because it improperly imposes fiduciary responsibilities upon an employer when it amends a plan. The fallacy of this reasoning is that amending a pension plan is *not* prohibited by ERISA, so long as the statutory minimum standards are satisfied, and is *not* under any circumstances a fiduciary act or a "transaction" within the meaning of ERISA § 406(a)(1).

As a result, the decision below severely curtails a plan sponsor's freedom to amend a plan under ERISA, becauase it holds for the first time that a plan sponsor can be liable when it creates new plan benefits in a manner consistent with ERISA's substantive requirements. The decision should be reviewed because both the text of ERISA and this Court's prior decisions confirm that plan amendments are permitted under these circumstances.

B. The Decision Below Conflicts With The Decisions Of Other Circuits.

At least nine other circuits have considered the issue of whether employers (or other plan sponsors) are held to fiduciary

[3] Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), provides:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect – (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; . . . .

standards when amending an ERISA plan. All of these circuits have squarely held that, when establishing eligibility requirements for a pension plan, an employer (or other plan sponsor) does *not* act in a fiduciary capacity. The plan sponsor is therefore free to adopt eligibility requirements that promote its own corporate interests, even when those interests conflict with the interests of the participants or beneficiaries of the plan, so long as the minimum participation, funding, and vesting requirements of ERISA are satisfied.

A good example of this rule can be seen in the Seventh Circuit decision in *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). There, a company that maintained an overfunded pension plan found itself the target of a hostile takeover bid. Seeking to make itself an unattractive target, the corporation amended its pension plan to provide that, if a takeover occurred, the surplus plan assets would be fully used to pay benefits to active employees only. Certain retirees sued, contending among other things that the corporation had breached a fiduciary duty by "using" plan assets to serve its own interests.

The Seventh Circuit assumed for purposes of its decision that the corporation's "managers were up to no good – that they amended the pension plan to serve their own interests." 19 F.3d at 1186. Even with the assumption that the plan was amended for reasons of "managerial self-protection," *id.*, the Seventh Circuit affirmed the dismissal of the plaintiffs' claim on the ground that the company had "dealt with the plan as settlor, not as trustee," *id.* at 1188, and that "when amending the plan . . . the defendants did not act as fiduciaries under ERISA." *Id. Accord Fletcher v. Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer's decision to provide special retirement benefits only to selected employees "was a design decision that did not implicate [the employer's] fiduciary duties under ERISA"). The reasoning of the

Ninth Circuit below thus directly conflicts with that of the Seventh Circuit.

The Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits also recognize that amending an ERISA plan is *not* a fiduciary act and therefore cannot constitute a prohibited transaction. A partial listing of the decisions reflecting this rule appears below:

Second Circuit. *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) ("An employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary."); *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990) (employer's decision to exclude certain employees from the design of an early retirement program does not implicate fiduciary duties under ERISA).

Third Circuit. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-61 (3d Cir. 1990) ("we find it extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word 'administration' encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements").

Fourth Circuit. *Sutton v. Weirton Steel Division*, 724 F.2d 406, 411 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) (plan amendments which reduced unfunded contingent benefits were "not to be reviewed by fiduciary standards").

Fifth Circuit. *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that the benefits reduced or eliminated are not accrued or vested at the time, and

that the amendment does not otherwise violate ERISA or the express terms of the plan").

Sixth Circuit. *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) ("[n]either Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide"); *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second.").

Eighth Circuit. *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987) (employer permitted to unilaterally amend welfare benefit plan).

Tenth Circuit. *Averhart v. U S West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) ("the selective provision of benefits under the [pension plan] amendment was a matter of plan design not subject to ERISA's fiduciary standards and judicial review").

Eleventh Circuit. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) ("the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits").

The Ninth Circuit's departure from this rule in the decision below warrants review because the court's analysis conflicts with

the preceding authorities in that it imposes fiduciary liability upon a plan sponsor for amending the plan.[4]

C. The Decision Below Is Wrong On The Merits.

Section 406(a)(1)(D) of ERISA provides, in pertinent part, that "[a] fiduciary" shall not cause a pension plan to engage in a "transaction [that] constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan . . . ." 29 U.S.C. § 1106(a)(1)(D). The Ninth Circuit determined that "Lockheed's adoption of the 1990 plan amendments" constituted a prohibited transaction within the meaning of Section 406(a)(1)(D) "because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed." App. at 18a. In other words, the court of appeals held that Lockheed breached its fiduciary duty when it amended its Plan to provide early retirement benefits, because the releases required as a condition of eligibility for those new benefits "relieved Lockheed of countless liabilities or potential liabilities to thousands of employees." *Id.* at 17a-18a.[5]

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[4] The decision below acknowledged that prior Ninth Circuit decisions, such as *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994), reflect an employer's "extensive" freedom to amend a plan. App. at 15a. However, the court then proceeded to hold that, under certain circumstances, a plan amendment may constitute a prohibited transaction, App. at 16a, which cannot be reconciled with the rule followed by the other circuits.

[5] In a footnote, the Ninth Circuit attempted to disclaim any intention of deciding the issue of whether "an employer acts as a fiduciary when it amends the plan in a way that affects plan assets." App. at 14a n.5. Unless Lockheed acted as a fiduciary when it amended the Plan, however, Lockheed and the Plan's trustees (who are fiduciaries) could not engage in a prohibited transaction, or otherwise breach their fiduciary duties, when they administered the amended Plan in accordance with its terms. Moreover, the district court directly addressed the issue of whether amending the Plan was a fiduciary act and expressly held that it was not. App. at 30a-31a. The Ninth Circuit's reversal of this ruling makes it clear that it has, in fact, held the amendment to be a fiduciary act.

The principal flaw in the court's reasoning lies in its failure to recognize that, in amending the Plan to create new pension benefits for a certain group of existing participants who volunteered to leave their Lockheed employment, Lockheed was not acting in a fiduciary capacity and did not engage in any sort of "transaction," prohibited or otherwise, under ERISA § 406.[6] The Seventh Circuit in *Johnson* rejected a "prohibited transaction" argument virtually identical to the one accepted by the decision below, holding that no prohibited transaction could occur because none of the actions in question, including both the plan amendment and administration of the plan in conformity with that amendment, "transferred, sold, exchanged, or otherwise affected any asset of the plan." 19 F.3d at 1189. Contrary to the decision below, the Seventh Circuit correctly held that the plan sponsor's decision to amend cannot be a prohibited transaction as a matter of law, because amending the plan is a settlor function rather than a fiduciary act.

In attempting to rationalize its prohibited transaction holding, the decision below characterized the eligibility requirement for the early retirement window program -- that a release be signed by early retirees as a condition of receiving additional benefits -- as a "purchase" of releases with the use of Plan assets. App. at 13a. This "purchase" analogy, however, only emphasizes the absence of any unlawful fiduciary conduct. If the Plan fiduciaries had paid money from the Plan to settle lawsuits against Lockheed that were unrelated to pension benefits, they would, as the opinion below suggests, have violated ERISA § 406(a)(1)(D). But that is not what happened. The fiduciaries of Lockheed's Plan did not transfer assets to Lockheed, nor did they use Plan assets to pay

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[6] The court of appeals' misreading of the applicable law is exemplified by its citation to its prior decision in *M&R Investment Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982), as "holding that a plan amendment" violated a different prohibition in ERISA § 406(a). App. at 16a. In fact, *M&R Investment Co.* involved a loan (which clearly is a "transaction"), and *not* a plan amendment.

third parties who had asserted claims against Lockheed. Instead, Plan assets were used solely to pay additional benefits to participants who satisfied the conditions of the early retirement window, *pursuant to the amended terms of the Plan*. The Seventh Circuit's decision in *Johnson* holds that this cannot be a prohibited transaction because a plan sponsor's decision to increase pension benefits cannot fairly be viewed as the "management or disposition of [a plan's] assets" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). 19 F.3d at 1189. *Accord, Phillips v. Amoco Oil Co.*, 799 F.2d at 1472 (rejecting plaintiffs' prohibited transaction argument as "patently inapplicable to the facts of this case").

Moreover, this "purchase" rationale would logically apply to a wide range of routine business practices heretofore never thought to constitute unlawful prohibited transactions. Employers routinely create or amend their pension plans (as opposed to raiding and using a plan's assets) to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases. All of these practices and many others provide substantial benefits to the employer. Of course, that is their very purpose. Until the decision below, however, no court ever suggested that these common employer practices were illegal "purchases" made with plan assets.

Enticing employees voluntarily to retire early for additional retirement benefits conditioned upon a release of employment-related claims against their employer also obviously serves a corporate purpose. But just as an employer may amend its pension plan to increase retirement benefits to end a strike or substitute as a wage increase, the employer is not taking and using plan assets in a prohibited transaction or engaging in any other fiduciary

breach when it amends its plan to encourage voluntary early retirement. Moreover, early retirement windows serve a useful social purpose -- retirement with income is preferable to layoff without income -- as recognized by Congress when it specifically approved waivers of ADEA claims in retirement window situations. *See* S. Rep. No. 101-263, 101st Cong., 2d Sess. 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1557 ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . .").

The decisions of other circuits have either not questioned under ERISA, or upheld the validity of, releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[7] In addition, the Treasury Department has adopted regulations which expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers as long as nondiscrimination and vesting requirements are satisfied. *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan).[8] By characterizing the plan amendment adopting the release requirement as a "prohibited transaction," the Ninth Circuit has

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[7] *See, e.g., Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988). *See also Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988).

[8] The IRS has also ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* T.A.M. 9516005 (Dec. 22, 1994).

achieved a result that is inconsistent with both Treasury regulations and the law of every other circuit to consider the issue.

The Court should therefore accept this case for review, in order to resolve the important issue of whether a plan sponsor acts as a fiduciary, or engages in a prohibited transaction under ERISA, when it amends its pension plan to achieve a "significant benefit," App. at 18a, for the employer.

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *LANDGRAF V. USI FILM PRODUCTS*, BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT.

The decision below also held that the substantive change in the law contained in OBRA 1986 must be given retroactive effect, so that employers would be compelled to grant benefit accrual for service *before* employees became participants in their employers' pension plans. App. at 5a. In respondent's individual case, this means that Lockheed is required to retroactively grant him pension benefit credit for all years since he was hired in 1979, *even though he did not become a Plan participant until 1988.*

The result reached by the Ninth Circuit is flatly inconsistent with this Court's recent decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), which held that statutes are presumed to apply prospectively, and will not be applied retroactively "absent clear congressional intent favoring such a result." 114 S. Ct. at 1505. *Landgraf* emphasizes that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 1497. This stems from the closely related notions that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and

to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Id.* The decision below is contrary to these principles, because by holding OBRA 1986 to apply retroactively, the court of appeals has imposed substantial additional pension liabilities upon Lockheed as well as numerous other employers without any statutory language that compels such a result.

The court of appeals' error is apparent in light of the substantive changes made by OBRA 1986. Prior to OBRA 1986, both ERISA and the ADEA recognized two different rules that permitted pension plans to distinguish between older and younger employees. For convenience, petitioners will refer to one rule as the "Age 60 Exclusion Rule" and the other rule as the "Post-NRA Accrual Cessation Rule" where "NRA" refers to normal retirement age.

The Age 60 Exclusion Rule refers to the fact that prior to OBRA 1986 both ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2), and § 410(a)(2) of the Internal Revenue Code, 26 U.S.C. § 410(a)(2), allowed employees hired within five years of the age specified by the plan as the "normal retirement age" to be excluded from participating in a pension plan.[9] Because most plans defined normal retirement age as 65, this petition refers to this rule as the Age 60 Exclusion Rule. The Age 60 Exclusion Rule was eliminated by section 9203 of OBRA 1986.

The second rule, referred to above as the Post-NRA Accrual Cessation Rule, permitted plans to cease accruals of pension benefits for years of participation after a participant attained normal retirement age. Thus, even if an older employee had become a participant in a pension plan, it was still lawful for

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[9] In Lockheed's case, this meant that employees hired at age 60 or older could lawfully be excluded from the Plan. Such a provision was in fact included within Lockheed's Plan. App. at 9a n.2.

the plan to provide that no further benefit accrual would be made on his or her behalf under the plan after attainment of normal retirement age.

Unlike the statutory basis for the Age 60 Exclusion Rule, the basis for the Post-NRA Accrual Cessation Rule rested in the legislative history of the 1978 amendments to the ADEA.[10] This legislative history caused the Department of Labor to promulgate an interpretation of the ADEA that allowed the Post-NRA Accrual Cessation Rule. 43 Fed. Reg. 43,264 (1978). From the time of its promulgation the Post-NRA Accrual Cessation Rule was attacked as an incorrect interpretation of the ADEA.[11] The EEOC's failure to repeal the rule eventually led to litigation challenging the rule, which was ongoing at the time Congress considered and passed OBRA 1986.

Sections 9201 and 9202 of OBRA 1986 eliminated the Post-NRA Accrual Cessation Rule. Section 9201 of OBRA 1986 amended the ADEA to make it unlawful for an employer to maintain a pension plan "which requires or permits -- (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . ." 29 U.S.C. § 623(i)(1). Section 9202(a)(2) of OBRA 1986 made a parallel amendment to ERISA. 29 U.S.C. § 1054(b)(1)(H)(i) (1988).

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[10] This legislative history is summarized in the initial district court decision in *Bell v. Trustees of Purdue University*, 658 F. Supp. 184, 187-189 (N.D. Ind. 1987), *remanded*, 845 F.2d 1023 (7th Cir. 1988), *on remand*, 761 F. Supp. 1360 (N.D. Ind. 1991), *aff'd*, 975 F.2d 422 (7th Cir. 1992).

[11] As recounted in *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987), the EEOC (which succeeded the DOL as the agency with enforcement authority over the ADEA) went through a series of gyrations beginning in 1980 with respect to whether the DOL's interpretation should be repealed. 655 F. Supp. at 233-34.

A. The Language Of Section 9204(a)(1) Expressly Provides That Sections 9201 And 9202 Apply Prospectively.

OBRA 1986 expressly provided that the abolition of the Post-NRA Accrual Cessation Rule was not to take effect until on or after January 1, 1988. There is no hint of retroactivity in this statutory language:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note. The district court concluded that the "plain language" of this statute compelled the conclusion that sections 9201 and 9202 did not apply retroactively. App. at 26a. The district court further held that because respondent was not a Plan participant prior to December 25, 1988, he did not accrue any pension benefit credit prior to that date. *Id.*

By contrast, the court of appeals held that the "most natural reading" of the same statutory language compelled the conclusion that "pre-enactment service years must be included in benefit accrual calculation;" *i.e.*, that the statute "applies retroactively." App. at 7a & n.1. This reasoning seriously misreads the plain language of the statute, however, because it confuses the concepts of (1) the "rate of an employee's benefit accrual" (as used in sections 9201 and 9202 of OBRA 1986) with (2) the total benefit accrued.

The court of appeals' error is best illustrated by the deceptively simple, yet illogical, syllogism used in its opinion. After correctly noting that the OBRA 1986 amendments forbid age-

based reductions in "the rate of benefit accrual," App. at 7a, the court stated:

> Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.

It is true, of course, that respondent's entirely lawful exclusion from the Plan for nine years resulted in a reduction of his total accrued benefits as of December 25, 1988 – he had none since he had never participated in the Plan and no benefit is provided for employees who were never participants. But section 9202 does not refer to an individual's total accrued benefits. Instead, section 9202 forbids age-based distinctions in the *rate* at which employees accrue benefits; *i.e.*, the plan must accrue benefits at the same rate for all participants regardless of age. A "rate of benefit accrual" differs from the concept of total accrued benefits in the same way that a vehicle's speed in miles per hour differs from the total miles travelled.[12]

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[12] This is illustrated as follows: Assume that respondent's final compensation were $50,000 a year, that the Plan had a 1.5% of final compensation times years of participation formula, and that respondent would have had nine years of participation on December 25, 1988, if Lockheed had never adopted the Age 60 Exclusion Rule. (This is basically the Lockheed Plan's formula without certain calculations not relevant here.) Using these assumptions, it may be seen that the controversy between respondent (and the putative class he seeks to represent) and Lockheed concerns the amount of his accrued benefit under the Plan on December 25, 1988, when he commenced participation. Respondent asserts that this accrued benefit is $6,750 (nine years times .015 times $50,000). Lockheed asserts that the accrued benefit is $0 (zero years times .015 times $50,000). Neither party disputes, however, that respondent's *rate of benefit accrual* became 1.5% with respect to future service, i.e., service from December 25, 1988, onward. The dispute relates only to the amount of accrued benefits that should be credited to respondent (and similarly situated employees) as of his first day of participation in the Plan, for years of service when he was *not* a participant in the Plan.

If OBRA 1986 is applied prospectively, then once respondent became a participant he would commence accruing benefits at exactly the same rate as the other participants upon its effective date, with neither a cessation of benefit accruals nor a reduction in the rate of his accrual. This would completely satisfy both sections 9201 and 9202. The decision below nonetheless found this interpretation of OBRA 1986 to be untenable because it would lead to "discriminatory effects," since respondent would receive no pension credit for his pre-1988 employment with Lockheed and thus would receive a smaller pension than if he were given such credit. App. at 9a. This, however, is circular reasoning. The so-called "discriminatory effects" are simply the result of prospectively applying a new statute that expanded the concept of age discrimination. The Ninth Circuit's rationale is inconsistent with *Landgraf*, because under the Ninth Circuit's reasoning any expansion of the employment discrimination laws would have to be applied retroactively in order to avoid similar "discriminatory effects."

The decision below fails to acknowledge that the statutory language does *not* state that the new benefit accrual rule should be applied retroactively; instead, section 9204(a)(1) states that the new rule is to be applied "only with respect to plan years beginning on or after January 1, 1988, . . ." The court of appeals' contrary interpretation is not supported by the statutory language, since no part of the statute states that OBRA 1986 is to be applied retroactively. Moreover, the decision deprives a different portion of OBRA 1986 – section 9204(b) – of any rational meaning, thus violating a basic canon of statutory interpretation.[13]

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[13] Section 9204(b) contains the effective date for section 9203 of OBRA 1986. Section 9203 addresses when employees are eligible to become plan participants, and repealed the portion of ERISA, 29 U.S.C. § 1052(a)(2), allowing the Age 60 Exclusion Rule. Section 9204(b) states:

(continued...)

B. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Operates Retroactively.

The court below also concluded that because the effective date language in section 9204(a)(1) differed slightly from that of section 9204(b), section 9204(a)(1) should be read to require retroactivity. This reasoning also fails to survive scrutiny. This Court held in *Landgraf* that "negative inferences" made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity. *Landgraf*, 114 S. Ct. at 1493. Indeed, *Landgraf* rejected an argument quite similar to the one adopted in the decision below, since it placed "extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Id.*

The Ninth Circuit erred on this point because it failed to recognize that Congress had other reasons for using slightly different effective date language in sections 9204(a)(1) and 9204(b). While no one had suggested that the Age 60 Exclusion Rule violated the ADEA, pending litigation sought to overturn the Post-NRA Accrual Cessation Rule. *Supra* pp. 17-18. Congress was well aware of this controversy, and responded by attempting to leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) for the then-ongoing litigation by

[13] (...continued)
The amendments made by section 9203 shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date.

The Ninth Circuit's holding leaves section 9204(b) with no rational meaning, since years of participation are significant essentially *only* when calculating benefit accrual. If Congress intended to provide retroactive benefit accrual for employees for the periods prior to their participation, it could have expressly done so and would certainly not have included section 9204(b) as part of OBRA 1986.

using slightly different effective date language in section 9204(a).[14] There was absolutely no controversy, however, with respect to the legality of excluding from pension plans the thousands of employees (such as respondent) who were hired within five years of normal retirement age, because ERISA and the Internal Revenue Code expressly permitted this practice. Since no dispute existed on this issue, Congress adopted unambiguous prospective date language in section 9204(b). Its decision to do so does not imply that section 9204(a)(1) was intended to require retroactive pension benefit accrual for pre-1988 employment, because Congress could have mandated that result through express statutory language had it sought to do so. Imposition of such a substantial retroactive liability on plans and plan sponsors throughout the nation, who for years lawfully excluded many thousands of employees from plan participation, should not be lightly implied from congressional silence.

C. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only As Applied To Individuals Who Were Not Participants Before OBRA 1986.

The Ninth Circuit's decision is wrong for the additional reason that it conflicts with the interpretation of the IRS, the agency charged with enforcement of OBRA 1986. The IRS announced, in 1988, that it would interpret OBRA 1986 as having only prospective effect with regard to benefit accruals for the

[14] The Conference Report for OBRA 1986 acknowledged this controversy by stating that "[d]isagreement exists as to whether and to what extent benefit accruals . . . are required under ADEA, as currently in effect." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023.

thousands of employees who first became eligible to participate in a plan following enactment of OBRA 1986:

> In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, . . . *hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.*

Preamble to Prop. Treas. Reg. § 1.411(b)-2, 53 Fed. Reg. 11,877 (1988) (emphasis added). The same rule is stated in the text of the Proposed Regulation itself:

> [A] defined benefit plan is not required under [I.R.C.] section 411(b)(1)(H) [which corresponds to 29 U.S.C. §§ 623(i)(1) and 1054(b)(1)(H)(i)] to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan.

Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii).

The court of appeals refused to defer to these expert administrative views because the IRS's proposed regulation has not yet been finalized, declaring that "we need not accord deference to [the IRS's] proposed interpretations." App. at 13a n.3. This ignores the special fact present here, however, that the IRS had previously announced that its final regulations implementing OBRA 1986 will follow the proposed regulation on this point. IRS Notice 88-126, 1988-2 C.B. 538 (1988). The IRS also stated that the proposed regulation constitutes an "administrative pronouncement" which "may be relied upon to the same extent as a revenue ruling

or revenue procedure" and that "[t]axpayers may rely on this notice until the final regulations are published." *Id.* Thousands of taxpayers, including Lockheed, have in fact relied upon this IRS pronouncement since 1988. Because IRS revenue rulings are generally accorded deference in interpreting a statute that the IRS is charged with administering, *Bob Jones University v. United States*, 461 U.S. 574, 596 (1983), the IRS's interpretation of OBRA 1986 as having prospective application only should have been considered and given weight. *See Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (directing the court of appeals to consider the views of the IRS, because "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass'"), *quoting Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).[15]

Under *Landgraf*, statutes are not to be applied retroactively absent clear evidence in the statute itself that Congress so intended. There is no such evidence here; instead, all of the evidence is to the contrary. Further review is essential to correct the court of appeals' egregious failure to follow this Court's ruling in *Landgraf*.

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[15] The IRS is specifically authorized by statute to issue regulations implementing OBRA 1986. *See* 26 U.S.C. § 411(b)(1)(H)(v). Moreover, these Treasury regulations are to control the interpretation of the amendments made by OBRA 1986 to ERISA and the ADEA. *See* 29 U.S.C. §§ 623(i)(7) and 1054(b)(1)(H)(vi).

III. THE DECISION BELOW HAS IMPACT BEYOND JUST THE NINTH CIRCUIT, BECAUSE IT PUTS IN JEOPARDY MANY SOCIALLY BENEFICIAL VOLUNTARY EARLY RETIREMENT PROGRAMS AND WILL DISCOURAGE EMPLOYERS FROM ADOPTING SUCH PROGRAMS IN THE FUTURE.

The decision below warrants review not only because it is incorrect and inconsistent with the decisions of this Court, other circuits, and the administrative interpretation of the IRS, but also because it will create enormous practical problems in the administration of ERISA plans. The Ninth Circuit failed to recognize that employers routinely derive from their employee benefit plans a wide array of significant benefits that do not differ in any meaningful respect from the benefits Lockheed enjoyed as a result of the early retirement plan it offered its employees. For example, employers frequently reach agreements, when collectively bargaining with labor unions, in which the *quid pro quo* for enhanced retirement benefits is a lower wage increase, if not an outright wage reduction. Similarly, employers often allow employees to participate in a pension plan only if they agree in exchange to reduced wage compensation.[16] If the decision below is correct, then all of these commonplace practices -- each of which could be described as a "use of Plan assets to purchase a significant benefit" for the plan sponsor, App. at 18a -- would violate ERISA.

Besides calling into serious doubt the legality of thousands of plan amendments designed to benefit sponsoring employers, the Ninth Circuit's decision will be particularly disruptive because it invalidates a wide-spread method of corporate downsizing through the offering of enhanced retirement or other benefits under a "window" program. A 1989 report prepared by the General

[16] Such agreements are expressly recognized by Treasury regulations. *E.g.*, Treas. Reg. § 1.401(k)-1(a)(3)(iv).

Accounting Office ("GAO") showed that 80 percent of the companies listed in the Fortune 100 had offered some sort of exit incentive program (such as a "window" program) in the prior ten years, and that 55 percent of a sample of employers of 25,000 or more employees had sponsored such a program between 1981 and 1985. *See* General Accounting Office, *Use of Waivers by Large Companies Offering Exit Incentives to Employees*, GAO/HRD 89-87 at 2 (1989) ("1989 GAO Report"). Of employers that sponsored exit incentive programs, over 70 percent offered enhanced early retirement benefits under the company's pension plan, either alone or in combination with non-plan benefits. *Id.* at 4-5. More recent GAO and private studies confirm that this trend in usage of early retirement programs has continued into the 1990's.[17]

The empirical data also show that employee waivers of claims against the employer, similar to those used by Lockheed and declared illegal by the decision below, have been a frequent condition for eligibility in early retirement window programs. The 1989 GAO report estimated that 30 percent of the Fortune 100 companies that sponsored an exit incentive program required participating employees to sign a waiver as a condition for receiving enhanced benefits. *See* 1989 GAO Report at 2. Similarly, a 1991 report from an educational foundation in the employee benefit plan area reported that "[a]bout one-quarter of the firms utilizing early retirement programs ask employees who accept the incentives to retire to sign a form releasing the employer from any claim the

[17] *See* General Accounting Office, *Downsizing Strategies Used in Selected Organizations*, GAO/GGD 95-54 (1995) (reporting that 17 of 25 large organizations that had undergone downsizing efforts (including 17 major corporations, 5 state governments, and 3 foreign governments) had provided early retirement programs); *see also* Hewitt Associates, *Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans* (1992) (reporting that 186 companies from a survey of approximately 700 companies had offered early retirement window programs between 1988 and 1992 and that 56 of these companies had offered more than one such program).

employee might have against the firm." Grant, The "Open Window" -- Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10, 15 (March 1991).

The holding of the decision below -- invalidation as prohibited transactions under ERISA of waiver agreements used in connection with enhanced early retirement benefits -- not only declares illegal a longstanding and widespread practice, but is also impossible to reconcile with the ADEA, the federal law that most directly speaks to waivers in the context of early retirement incentive programs. In amending the ADEA in 1990, Congress expressly recognized that employee waivers are commonly sought in the context of early retirement window programs like that implemented by Lockheed. *See* S. Rep. No. 101-79, 101st Cong., 1st Sess. 3-17 (1989). Indeed, the ADEA sets forth criteria that apply when the waiver is sought in connection "with an exit incentive or other employment program," which encompasses programs like the one sponsored by Lockheed. 29 U.S.C. § 626(f)(1)(H). *See also* S. Rep. No. 101-263, 101st Cong., 2d Sess. 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1538 (the "trademark of voluntary reduction programs is a standardized formula or package of benefits designed to induce employees voluntarily to sever their employment"). It would be bizarre if Congress's efforts in 1990 to define the scope of permissible ADEA waivers were totally meaningless because such waivers are flatly banned by ERISA, yet that is the effect of the decision below.

The decision below will not only invalidate these extremely common employer practices in the nine states within the Ninth Circuit, but as a practical matter will do so on a nationwide basis. The population and economic growth of the states within the Ninth Circuit, combined with the extremely liberal venue rules of ERISA, make it likely that numerous nationwide employers will be subject

to suit in the Ninth Circuit even if headquartered elsewhere.[18] Unless reviewed and reversed by the Court, the decision below will establish national policy on the important issues it decides because any nationwide employer will be forced to treat the decision as dispositive of those issues.

The court of appeals' second holding -- that OBRA 1986 has retroactive effect -- will similarly have nationwide impact on every employer which adopted the Age 60 Exclusionary Rule and which, although headquartered elsewhere, does business and has employees within the Ninth Circuit. These employers, for the past seven years, have relied upon the proposed IRS regulations published in 1988, which correctly interpreted OBRA 1986 to have prospective application only. Unless the decision below is accepted for review and reversed, employers and pension plans nationwide will now, at great cost retroactively imposed, be required to provide past service credit for benefit accrual purposes for those years of service prior to 1988 for which thousands of employees were previously lawfully excluded from plan participation.

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[18] ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), provides that an action under ERISA may be brought in a United States district court in any district, *inter alia*, "where a defendant resides or may be found." Because so many employers may be "found" in the Ninth Circuit, employers headquartered outside of the circuit have frequently been sued there under ERISA. As an example, the following reported decisions involve ERISA suits against major employers whose headquarters (listed in parentheses and taken from Forms 10-K filed with the Securities and Exchange Commission) are outside of the circuit: *Mongeluzo v. Baxter Travenol Long Term Disability Plan*, 46 F.3d 938 (9th Cir. 1995) (Illinois); *Farr v. U S West, Inc.*, 58 F.3d 1361 (9th Cir. 1995) (Colorado); *Richardson v. Pension Plan of Bethlehem Steel Corp.*, ___ F.3d ___, 1995 U.S. App. LEXIS 28837 (9th Cir. Oct. 17, 1995) (Pennsylvania); *Joanou v. Coca-Cola Co.*, 26 F.3d 96 (9th Cir. 1994) (Georgia); *Williams v. Caterpillar, Inc.*, 944 F.2d 658 (9th Cir. 1991) (Illinois); *Orozco v. United Air Lines, Inc.*, 887 F.2d 949 (9th Cir. 1989) (Illinois); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990) (Minnesota); *Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279 (9th Cir. 1990), *cert. denied*, 498 U.S. 1087 (1991) (New York).

In sum, the Ninth Circuit's erroneous construction of ERISA and OBRA 1986 will have severe adverse consequences for thousands of employers throughout the United States. Because the decision below conflicts with the decisions of the other circuits, and ignores the approach to retroactivity only recently emphasized by this Court in *Landgraf*, further review is essential.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to grant certiorari in this case.

DATED: November 17, 1995.

Respectfully submitted,

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FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Argued and Submitted
February 1, 1994 -- Pasadena, California

Filed July 18, 1995

Before: Dorothy W. Nelson, Stephen Reinhardt, and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti

COUNSEL

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Gordon E. Krischer, David E. Gordon, Paul Borden, O'Melveny & Myers, Los Angeles, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Paul Spink filed a complaint on behalf of himself and similarly situated individuals against Lockheed Corporation and certain individual defendants (collectively "Lockheed"). Spink alleged that Lockheed's retirement plan violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631 *et seq.*, as amended by the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874 (1986). The complaint also included individual claims based on ERISA and the federal common-law doctrine of equitable estoppel. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Spink appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS BELOW

Because we are reviewing a dismissal of Spink's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), we accept as true all the following material allegations of the complaint. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994).

Spink worked for various subsidiaries and divisions of the Lockheed Corporation between 1939 and 1950. In May 1979, Spink again began working for Lockheed at the age of 61. At the time he was rehired, the terms of the Lockheed Corporation Retirement Plan for Certain Salaried Employees (Plan) lawfully

excluded Spink from participating because he was over sixty years old. The Plan is a noncontributory defined benefit plan that covers substantially all salaried employees at Lockheed and certain subsidiaries.

Prior to rejoining Lockheed in 1979, Spink worked for Hughes Helicopters, where he expected to receive pension benefits if he continued to work through October 31, 1982. In an effort to recruit Spink from Hughes, Lockheed represented that if he accepted its offer of employment, Spink would participate in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. Lockheed personnel provided him with documents describing the benefits to which he would be entitled, and for the next four years sent him written year-end statements from the Plan notifying him of the amount of credited service he had accumulated as a Plan participant.

Lockheed notified Spink sometime in 1984 that he was not eligible to participate in the Plan because he was over sixty when hired.

In 1986, Congress passed OBRA 1986. OBRA 1986 amended ERISA, the ADEA, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age-based discrimination in participation and benefit accrual standards applied by employee benefit plans.

As a consequence of these amendments, for plan years beginning after January 1, 1988, the effective date of the amendments, Lockheed was required to allow employees hired after age sixty to participate in the Plan. Spink became a

participant on December 25, 1988 (the first day of the Plan's 1988 plan year). In 1989, Lockheed informed him that it did not intend to credit him with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. The Plan specifies that an employee who was previously excluded from the Plan would "not receive Credited Service for his pre-Member service []" under the terms of the Plan. Plan § 2.01(C).

On May 8, 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO) and a "1990 Voluntary Retirement Program" (VRP), which were available to certain employees until June 30, 1990 (collectively the "1990 Plan amendments"). These programs offered increased retirement benefits to eligible employees as an incentive to terminate their employment. The increased benefits were paid out of the Plan's surplus assets. To partake in the increased pension benefits, Lockheed required employees to release virtually all potential employment-related claims they might have against Lockheed. Although he was eligible for the SRO option, Spink did not elect it because he did not wish to waive any ADEA and ERISA claims he may have against Lockheed. Spink retired in June 1990.

On February 5, 1992, Spink filed a five-count complaint against Lockheed. He brought all counts in his individual capacity, and also designated Counts I through III as a class action on behalf of all similarly situated employees. Counts I and II allege that the OBRA 1986 amendments to ERISA and ADEA entitle Spink and similarly situated employees to benefits under the Plan calculated on the basis of periods worked both before and after the effective date of the statute. Count III alleges that the 1990 Plan amendments constituted a breach of fiduciary duty and a prohibited transaction under ERISA. Count V alleges that because Spink

relied on representations made by Lockheed, Lockheed is estopped from denying him benefits based on all of his employment since his rehire in 1979. Spink withdrew Count IV.

Lockheed moved to dismiss the complaint under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted, and the district court granted Lockheed's motion and dismissed the complaint with prejudice. Spink timely appeals.

II. STANDARD OF REVIEW

We review de novo a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 852 (9th Cir.), *cert. denied,* 115 S. Ct. 580 (1994). In addition, "the interpretation of ERISA, a federal statute, is a question of law subject to de novo review." *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 312 (9th Cir. 1993).

III. AGE DISCRIMINATION CLAIMS UNDER ERISA AND ADEA

We first consider whether the OBRA amendments to the ADEA and ERISA prohibit Lockheed from excluding Spink's and putative class members' pre-1988 years of service in calculating their accrued benefits. We conclude they do.

Prior to OBRA 1986, the ADEA and ERISA permitted an employer to deny participation in its pension plan to an employee who was over age sixty when hired if the plan's retirement age was sixty-five. *See* ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982 & Supp. V 1988); ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982

& Supp. V 1988). Congress enacted OBRA 1986 to change this situation.

The overall objective of the OBRA amendments was to "prohibit arbitrary age discrimination in employment." ERISA § 2, 29 U.S.C. § 621 (1988). To that end, § 9202 of OBRA 1986 amended ERISA by adding:

> [A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i) (1988). Similarly, OBRA § 9201 amended the ADEA by providing:

> [I]t shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits --
>
> > (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . .

ADEA § 4(i)(1), 29 U.S.C. § 623(i)(1) (1988 & Supp. V 1993). With regard to the effective date of these sections, OBRA 1986 provides:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note.

The parties agree that OBRA 1986 prohibits terminating or reducing the rate of benefit accrual because of the employee's age after January 1, 1988. They part ways over whether this prohibition requires that employers consider service years before the effective date of OBRA 1986 in calculating benefit accrual.

As with every question of statutory interpretation, we start with the language of the statute. The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit accrual calculation. OBRA prohibits age-based reduction in "the rate of benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.[1]

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[1] Spink and Amicus, the American Association of Retired Persons, argue that including in benefit accrual any service years before OBRA 1986's effective date would not be a retroactive application of the amendments. Rather, they contend, this interpretation would merely apply the current law, prohibiting reduction of benefits based on age, to the operative formula. *See Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422, 424 (N.D. Ill. 1989). We disagree.

(continued...)

In the context of this case, the Plan provides that "eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service." Plan § 4.01. An employee could participate in the Plan, and therefore accumulate credited service years, "upon being employed in a Covered Group" unless--prior to OBRA's effective date--the employee commenced employment when he or she was sixty years of age or older. Plan § 2.01(B) & (C). Because Spink began work in a Covered Group after he had celebrated his sixtieth birthday, he did not become a Member of the Plan when he began work. Had he not been excluded because of his age, he would have begun to accumulate credited service years when he started working in a Covered Group and all those years would be used to calculate the amount of his benefits. Put another way, Spink's credited service was calculated as lower than that of a younger employee's because

[1] (...continued)

To the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively. Retroactivity depends on whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 & n.3 (1994). "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 1499. In light of the fact that OBRA 1986 prohibits a previously legal basis for discriminating in pension plans, and in consideration of the increase in pension obligations that will result from inclusion of pre-enactment service years, we acknowledge that OBRA 1986 operates retroactively *in this context*. However, this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute manifested in its text. *See id.* at 1492; *see also* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4024 ("The conferees recognize that repeal of [law that permits age-based exclusion from plans] may have the effect of increasing an employer's minimum funding requirements significantly from employees hired within five years of normal retirement age.").

he was denied credit for all years of his employment in a Covered Group.[2]

Such an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions. The fact that the reduction would be accomplished indirectly, through reducing the number of credited service years, rather than directly by reducing the rate itself, is of no consequence.

Lockheed would have us focus on the cause of the disparity: the previously lawful exclusion of older employees from participation in the Plan. This argument raises the question of cause and effect. Since the cause of the disparity was lawful, Lockheed urges, the disparate result must therefore be lawful. However, OBRA 1986 does not speak to causes. Rather, by invalidating age-based reductions in the Plan's benefit accrual, OBRA 1986 forbids the discriminatory effects of the Plan. Lockheed cannot avoid the prohibition against age-based reductions in benefits by pointing to previously lawful causes of those reductions. *See* 29 U.S.C. § 1001(b); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (remedial purpose of ERISA requires broad reading).

Congress explicitly excepted some nondiscriminatory causes from its prohibition against disparities in benefit accrual.

[2] We acknowledge that our holding requiring that employees receive credit for years they were not Plan participants is contrary to Plan § 2.01(C). Section 2.01(C) of the Plan provides that "an Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service." However, plan provisions are not controlling if they are inconsistent with the provisions of ERISA. *See* ERISA § 404(1)(D), 29 U.S.C. § 1104(1)(D) (1988 & Supp. V 1993).

For example, ERISA § 204(b)(1)(H)(ii), 29 U.S.C. § 1054(b)(1)(H)(ii) (1988), provides:

> A plan shall not be treated as failing to meet the requirements of this subparagraph because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

Under this provision, differences in accrual caused by a plan's service cap or early retirement provisions are permissible, even though they may result in disparities. *See Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1200-01 (8th Cir. 1992). When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply. *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); *Horner v. Andrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), *cert. denied*, 484 U.S. 912 (1987); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992). Therefore, Congress' express exception of some nondiscriminatory causes of disparities in benefit accrual indicates that other discriminatory causes -- such as Lockheed's previously lawful exclusion of Spink from participation -- are not permissible.

Research into the legislative history also verifies our reading of the language of the OBRA 1986 amendments. An earlier version of OBRA 1986 adopted a Senate amendment that specifically provided that OBRA 1986 would apply only to individuals employed after December 31, 1988 and only to accrual computation periods beginning after December 31, 1986. H.R.

Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4022, *and* 132 Cong. Rec. 25,044 (1986). Under this provision, pre-1986 employment was clearly excluded. However, Congress rejected this proposal in conference, *see* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023, and instead adopted a provision that would apply to all employees "who have one hour of service in any plan year to which the amendments apply." OBRA § 9204(a)(1). Congress knew the appropriate and specific language necessary to exclude pre-1988 service and chose not to include it. *See Arizona Elec. Power Co-op v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). When Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, we presume that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Finally, we note that other provisions of OBRA 1986 demonstrate that Congress was well aware of how to limit application of the amendment to post-enactment service years. Section 9204(b) provides that "amendments made by section 9203 [amending 29 U.S.C. §§ 1002(24)(B) & 1052(a)(2) and 26 U.S.C. §§ 410(a)(2) & 411(a)(8)] shall apply only with respect to plan years beginning on or after January 1, 1988, and *only with respect to service performed on or after such date*." (Emphasis added). Since Congress chose not to include such a limitation in OBRA § 9204(a), the provision governing the effective date of §§ 9201 and 9202, we can infer that Congress did not intend that limitation to apply to those sections. *See Russello*, 464 U.S. at 23.

Lockheed contends that § 9204(b) compels the opposite result. To reach this conclusion, Lockheed points to the fact that § 9204(b) amends ERISA § 202, 29 U.S.C. § 1052, which

contains minimum participation standards. Lockheed starts with the observation that ERISA §§ 204(b)(1) and (b)(4)(A) provide that benefit accrual is based on years of participation. From there, Lockheed reasons that by limiting the retroactivity of participation requirements through § 9204(b), Congress indirectly limited the benefit accrual calculation to years after OBRA 1986's effective date. If § 9204(b) were the only statement about the effective date of OBRA 1986, Lockheed's reasoning might be persuasive. However, § 9204(b) is directly preceded by § 9204(a)(1), which explicitly pertains to the amendments made by the OBRA provisions at issue, §§ 9201 and 9202.

The first clauses of §§ 9204(a)(1) and 9204(b) are virtually identical. Both state that the amendments they govern shall apply "only with respect to plan years beginning on or after January 1, 1988, . . ." However, the latter portion of § 9204(b) includes the further limitation that the amendments made by § 9203 apply "only with respect to service performed on or after such date." By contrast, § 9204(a)(1) concludes that §§ 9201 and 9202 apply "only to employees who have 1 hour of service in any plan year to which such amendments apply." We cannot comprehend any logical reason why Congress would not include a limitation in the immediately preceding subsection, which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting the application of benefit accrual standards. *See Russello*, 464 U.S. at 23 (declining to find that differing language in two subsections has the same meaning).

All aspects of OBRA 1986's language, structure, and legislative history indicate Congress' intention that pre-enactment service years be included in calculating benefit accrual for older

employees.[3] Lockheed withheld Spink's service years from 1979 to December 25, 1988. Therefore, Spink has stated a claim for violation of OBRA 1986 upon which relief can be granted.[4]

IV. THE 1990 PLAN AMENDMENTS

Next we turn to Lockheed's amendment of the Plan to allow "purchases" of releases of potential claims. Spink contends that Lockheed violated ERISA when it adopted the 1990 Plan amendments, which required employees to execute a release of all

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[3] Both parties have implored us to apply the IRS's proposed regulations interpreting OBRA. Spink seeks to have us follow the reasoning of *Puckett*, 705 F. Supp. at 423, which relied on the IRS's proposed regulations to find that OBRA requires that pre-1988 service be included in benefit accrual. In reaching its decision, the *Puckett* court relied on the language in the regulations that states, "For a participant who has at least 1 hour of service for the plan sponsor in a plan year beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, including years of service before 1988, because of age in determining the participant's plan benefit." Prop. Treas. Reg. 1.411(b)-2(f)(1)(ii), 26 C.F.R. Part 1, 53 Fed. Reg. 11876, 11884 (April 11, 1988).

Lockheed would instead have us rely on other language in the proposed regulations, "However, a defined benefit plan is not required under section 411(b)(1)(H) and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan . . . ", *id.*, and other provisions that suggest pre-1988 service should not be credited to employees in Spink's position. *See* 26 C.F.R. Part 1, 53 Fed. Reg. 11877.

We decline to apply either of these interpretations. Although the IRS has announced its intention to adopt final regulations that are essentially consistent with these proposed regulations, *see* I.R.S. Notice 88-126; 54 Fed. Reg. 604-01, it has not yet done so, and we need not accord deference to its proposed interpretations. *See Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

[4] In Count V of his complaint, Spink claims that the doctrine of equitable estoppel bars Lockheed from denying credit for his post-1979 service. Because we conclude that OBRA 1986 requires employers to credit preenactment service, we need not address the equitable estoppel claim.

potential claims before they could elect the SRO or VRP options and receive enhanced benefits. He contends that this arrangement involved the use of existing plan assets to benefit Lockheed and constituted a prohibited transaction with a party in interest, a *per se* violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1988).[5] We agree.

ERISA provides, in pertinent part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . .

ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). "Party in interest" is defined in ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C) (1988), to include "an employer any of whose employees are covered by such plan."

Undeniably Lockheed is a party in interest under 29 U.S.C. § 1002(14)(C). It is equally indisputable that a party in

[5] Spink also argues in the alternative, both in his complaint and before this court, that Lockheed's 1990 Plan amendments constituted a breach of Lockheed's fiduciary duty, prohibited by ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i), and an unlawful inurement of plan assets barred by ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). Because we hold that Spink's second cause of action states a viable claim for violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106, we leave for another day the issue of whether an employer acts as a fiduciary when it amends the plan in a way that affects plan assets. We also decline to address Spink's anti-inurement argument.

interest who benefitted from an impermissible transaction can be held liable under ERISA. *See, e.g.*, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988) (stating that ERISA § 502(a)(3) gives plan participants the right to seek equitable relief against both the trustees who engaged in prohibited transaction and the party in interest who profited from it); *Kyle Rys. v. Pacific Admin. Servs.*, 990 F.2d 513, 516 (9th Cir. 1993) ("Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), equitable relief for non-fiduciary liability is available only where a "party in interest" has participated in "prohibited transactions."). The only remaining question, then, is whether the 1990 Plan amendments were a transaction that directly or indirectly benefitted Lockheed.

Lockheed advances two arguments why we should answer this question in the negative. First, Lockheed suggests that by amending the Plan, it was merely imposing an eligibility requirement (signing a release of employment-related claims) on the SRP or VRP benefits. Employers have free rein under ERISA, Lockheed proclaims, to impose eligibility requirements and amend plans. Alternatively, Lockheed argues that the releases it obtained as a result of the 1990 Plan amendments were not a "benefit" to Lockheed in violation of ERISA. We address these arguments in turn.

Relying on *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988), and *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1026 (N.D. Cal. 1988), Lockheed claims that it has the unfettered right to amend the Plan and to establish eligibility requirements. Indeed, this court has held that "[employers] remain free to unilaterally *amend* or *eliminate* [severance] plans, without considering the employees'

interests." *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994) (emphasis supplied).

Lockheed misinterprets these statements, however, and overstates its freedom to amend. An employer's freedom to amend, while extensive, is not boundless. Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

ERISA prohibits use of plan assets by or for the benefit of sponsoring parties in interest. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). This prohibition would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question. Similarly, those provisions prohibit plan documents from providing for use of plan funds to buy the releases. In other words, Lockheed cannot avoid the prohibitions of ERISA by writing an amendment instead of a check. *See M & R Invs. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (holding that a plan amendment requiring the plan to lend money is a violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1006(a)(1)(B)); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (finding plaintiff stated a viable claim by alleging that through amending and terminating plan, fiduciaries misused plan assets to further interests other than those of plan participants).

Lockheed's second argument is that the releases either were not a net benefit to Lockheed, or that they were merely an

incidental benefit. Lockheed urges that the releases do not yield any net benefit to Lockheed because funds paid in exchange for the releases ultimately reduced the amount of surplus that will revert back to Lockheed upon termination of the Plan. Additionally, Lockheed reasons that the releases did not come free to Lockheed because it is ultimately responsible for any Plan shortfall.

Lockheed's astute examination of the economic realities of this situation ignores the central purpose of ERISA. The statute does not require employers to provide employee benefit plans; however, once an employer places assets in trust for the benefit of employees, it can no longer treat those assets as its own. "The crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators . . . ." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Indeed, Lockheed's reasoning proves too much: It would justify an employer spending plan assets freely, without regard to any of ERISA's prohibitions. The logic of Lockheed's argument collapses under its own weight.

The releases at issue cannot be accurately characterized as an incidental benefit. Although no copy of the release appears in the record, the Plan describes the releases as waiving "any claims the Eligible Member may have against [Lockheed] arising from termination of employment or otherwise." Plan § 15.03(B)(4). The releases purport to be all-encompassing,[6] and assuming *arguendo* that such releases are valid despite their breadth, they relieved Lockheed of countless liabilities or potential liabilities to

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[6] Spink did not raise, and therefore we do not address, the issue of whether Lockheed's waivers are impermissibly broad in their scope, or whether an employer can condition the receipt of benefits on a release of claims.

thousands of employees. This windfall can hardly be considered an incidental benefit. The fact that the amount of Lockheed's liability is not readily quantifiable does not render it incidental.

For these reasons, we conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed. Spink's second cause of action therefore states a viable claim.

V. COLLATERAL ESTOPPEL

Spink's next contention is that the district court erred when it declined to apply the doctrine of nonmutual offensive collateral estoppel to bar Lockheed from contesting the allegation that it breached its fiduciary duties under ERISA. He argues that Lockheed had a full and fair opportunity to litigate the same issue when it moved to dismiss a nearly identical claim pending before Judge Rafeedie, *see Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990) (unpublished order), and should be bound by the adverse ruling in that case.

Trial courts have broad discretion to determine when to apply offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). The district court did not abuse its discretion by declining to do so here.

"Only a final judgment that is 'sufficiently firm' can be issue preclusive." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988) (citing *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983)). To ascertain the "firmness" of a

judgment, courts look to various factors, including whether the decision was tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was actually reviewed on appeal. *Luben*, 707 F.2d at 1040 (quoting Restatement (Second) of Judgments § 13 cmt. g (1982)). In *Luben*, we affirmed the district court's determination that an interlocutory order issued by another judge in the same district was not "sufficiently firm" because "it could not have been the subject of an appeal." *Id.*

Judge Rafeedie's denial of Lockheed's motion to dismiss in *Engineers and Scientists Guild* was not appealable and the parties subsequently settled the case. Under those circumstances, the district court did not abuse its discretion by refusing to apply issue preclusion to bar Lockheed from contesting Spink's fiduciary breach claim.

VI. ATTORNEYS' FEES

Finally, we consider Spink's request for attorneys' fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988). This provision grants us discretion to determine whether to award attorneys' fees and costs. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

> "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of

an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions."

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528-29 (9th Cir. 1993) (*as amended* Mar. 22, 1994) (quoting *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1222 (9th Cir. 1988)). We read § 1132(g)(1) "broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under the plan, should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (internal quotations omitted).

Since most of the pertinent factors weigh in favor of Spink, we conclude that attorneys' fees are appropriate. With respect to Lockheed's culpability, as we indicated above, Lockheed's manipulation of plan assets was in direct contravention of the express provisions of ERISA. Spink's claims in Counts I, II, and III of his complaint posited significant legal questions designated as a class action brought on behalf of all similarly situated employees. Lockheed is well able to satisfy a fee award and our award of fees will deter other employers from manipulating plan assets through plan amendments. Although Lockheed prevailed on the collateral and equitable estoppel claims and its arguments on the age discrimination claim were tenable, its arguments regarding the validity of the 1990 Plan amendments were meritless. Spink is entitled to attorneys' fees.

VII. CONCLUSION

For the foregoing reasons, the district court's dismissal of Counts I, II, and III of Spink's complaint is REVERSED; the district court's dismissal of Count V and the district court's denial of Spink's motion to collaterally estop Lockheed from contesting the allegation that it breached its fiduciary duty is AFFIRMED; Spink's request for attorneys' fees is GRANTED.

REVERSED in part; AFFIRMED in part.

NOT FOR PUBLICATION

No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Filed September 1, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, et al.,

Plaintiffs,

v.

LOCKHEED CORPORATION, et al.,

Defendants.

CASE NO. CV 92-800 SVW (GHKx)

July 31, 1992, Filed and Entered

ORDER GRANTING DEFENDANT LOCKHEED CORPORATION'S MOTION TO DISMISS

I. BACKGROUND

Paul L. Spink, the named Plaintiff, seeks additional pension benefits under the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan") sponsored by the named Defendant, Lockheed Corporation ("Defendant"). Defendant first employed Plaintiff in 1939, and then intermittently through 1950. After an interim of nearly thirty years, Defendant again hired Plaintiff in May 1979. Under the Plan terms in effect at the time of his hire in 1979, Defendant lawfully excluded Plaintiff from participating in the Plan because he was over sixty years old.

However, changes in federal law in 1986 compelled Defendant to permit Plaintiff to participate in the Plan beginning on December 25, 1988, the commencement date of the first fiscal Plan year following January 1, 1988. Plaintiff subsequently accrued benefits under the Plan until his retirement in June 1990.

In an effort to attenuate the effects of anticipated layoffs by inducing voluntary retirement, Defendant amended the Plan in 1990 to provide enhanced retirement benefits, allegedly paid out of surplus Plan funds, to participants deemed eligible to take early retirement. Participants choosing this option were required to sign a waiver of employment related claims. Although eligible, Plaintiff did not retire pursuant to this early retirement program.

In this action, Plaintiff alleges the following three claims in his individual capacity, and also on behalf of all similarly situated employees: first, statutory amendments to the federal law governing benefit plans allegedly require Defendant to provide retroactive participation and benefit accrual to all employees, like Plaintiff, who were excluded from Plan participation before 1988 because of age, and who have worked at least one hour in 1988; second, Defendant's 1990 Plan amendment allegedly breached a fiduciary duty in violation of federal law; and third, the same Plan amendment allegedly constituted a federally prohibited transaction because it benefitted Defendant, a party-in-interest. Finally, in a fourth claim brought solely in his individual capacity, Plaintiff alleges that he is personally owed retroactive benefits based on

equitable estoppel stemming from Defendant's alleged oral misrepresentations.[1]

On April 2, 1992, Defendant filed this Motion to Dismiss the entire action, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that: the relevant federal law is exclusively prospective regarding plan participation and benefit accrual; amending the Plan did not violate a fiduciary duty because no such duty applied; and, as pleaded, federal law does not allow recovery for alleged oral misrepresentations. The Court held a hearing on April 27, 1992 to consider this motion. Having considered the arguments of counsel, both written and oral, the Court GRANTS Defendant's Motion to Dismiss in its entirety because even assuming the truth of Plaintiff's allegations for the purposes of this Motion, Plaintiff fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A. Alleged Violations of ERISA and ADEA

Plaintiff focuses on certain provisions of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat. 1973, that amended the Employee Retirement Income Security Act of 1974 ("ERISA"), ch. 18, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 301-1144), the Age Discrimination in Employment Act ("ADEA"), ch. 14, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34), and the Internal Revenue Code of 1986, 26

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[1] In response to Defendant's Motion to Dismiss, Plaintiff filed an amended opposition on April 17, 1992 withdrawing Count IV, a claim for benefits under the Plan, from his Complaint.

U.S.C. Prior to OBRA 1986, none of these statutes prevented an employer from denying participation in its pension plan to employees who were hired after age sixty if the normal retirement age was sixty-five. Indeed, both ERISA and the IRC specifically allowed this practice until OBRA 1986 proscribed it.

In order to accomplish comprehensive reform, OBRA 1986 amended ERISA, the ADEA, and the IRC together. Thus, OBRA 1986 amended the plan participation provisions of both ERISA, 29 U.S.C. § 1052(a), and the IRC, 26 U.S.C. § 410(a)(2), as well as the benefit accrual provisions of ERISA, 29 U.S.C. § 1054(b)(1)(H), the ADEA, 29 U.S.C. § 623(j), and the IRC, 26 U.S.C. § 411(b)(1)(H).

The central legal issue Plaintiff raises under OBRA 1986 concerns the effective dates of the amended provisions of ERISA and the ADEA, rather than their substantive provisions. Plaintiff asserts that the OBRA 1986 amendments entitle him to retroactive Plan participation, and concomitant benefit accrual, for those years of employment following his hire in 1979 and preceding his initial Plan participation in 1988. Plaintiff's thesis is that Defendant failed to comply with the provisions of amended ERISA -- namely, 29 U.S.C. § 1052(a)(2) -- by not allowing him, once he had worked an hour of service in 1988, to participate retroactively in and, thus, to accrue benefits retroactively under the Plan.

The plain language of OBRA 1986, however, defeats Plaintiff's claim. The court holds that the relevant effective date provisions of the OBRA 1986 amendments to ERISA and the ADEA are *prospective* and thus do not provide Plaintiff the grounds to participate retroactively for periods of service prior to

his joining the Plan on December 25, 1988, nor to receive retroactive benefit accrual.

First, as concerns Plan participation, OBRA 1986 § 9203(a) amended ERISA such that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." *See* 29 U.S.C. § 1052(a)(2). However, OBRA 1986 § 9204(b) further states that "the amendments made by section 9203 shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* with respect to service performed on or after such date" (emphasis added). Thus, OBRA 1986 only required Defendant to allow Plaintiff to participate in the Plan beginning December 25, 1988 -- because that date marked the beginning of the first fiscal Plan year following January 1, 1988 -- and not for prior Plan years.

Second, because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual. To this end, the Court holds that one must first be a plan participant before one can enjoy benefit accrual. *See* 29 C.F.R. § 2530.204-1(b)(1) (service before an employee first becomes a plan participant is disregarded for benefit accrual purposes).

Moreover, the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion. In particular, OBRA 1986 §§ 9201 and 9202 amended the benefit accrual language in both ERISA and the ADEA to make unlawful "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's accrual on account of age." However, OBRA 1986 § 9204(a) plainly states that "the amendments made by sections 9201 [ADEA] and 9202 [ERISA] shall apply *only* with

respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). As such, it is apparent that Congress did not intend to retroactively impact benefit accrual provisions prior to January 1, 1988.

Given Congress' intention in this analogous context, Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation. To reiterate, the Court finds Plaintiff's argument unsupported by the unambiguous statutory language. Section 9204(a), which concerns the effective dates of OBRA 1986's participation amendments, plainly states: "The amendments made by section 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). Therefore, because the OBRA 1986 amendments only apply to Plan years beginning on or after January 1, 1988, Plaintiff is entitled neither to participate retroactively nor to accrue benefits retroactively for Plan years before 1988.

B. Alleged Violations Through Plan Amendment

Plaintiff next contends that in amending the Plan in 1990, Defendant breached its fiduciary duty under ERISA. This claim is based on the false assumption that amending the Plan constituted a fiduciary act. Plaintiff correctly observes that a corporate sponsor must discharge its obligations solely in the interests of the participants and beneficiaries when acting in its role as plan administrator. However, where, as here, a defendant is both an employer and an administrator of a pension plan, it is subject to

separate and differing responsibilities depending upon the role it is performing. As the Second Circuit has stated: "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (*quoting Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)), *cert. denied*, 474 U.S. 1113 (1986). Therefore, when acting in its corporate capacity, Defendant was obligated to "see that such benefit plans as it [chose] to maintain [were] designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020; *see also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets."), *cert. denied*, 481 U.S. 1016 (1987). As the Third Circuit explained:

> Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan. . . [It is] extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word "administration" encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements.

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161 (3rd Cir. 1990). The Sixth Circuit has similarly reasoned:

> There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second . . . . The case law . . . makes it clear that when an employer decides to establish, ***amend***, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto, 861 F.2d at 911-12 (emphasis added). Finally, the Ninth Circuit similarly differentiates the duties owed in amending a plan from those arising from plan administration. Reflecting this approach, the Ninth Circuit held in *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), that amending a benefit plan so that a corporate sponsor would receive any surplus funds not needed to pay participants did not by itself comprise an ERISA violation, but only constituted "a claim upon which relief may be granted in the context of the complaint's further allegations that the *fiduciaries* misused plan assets." *Id.* (emphasis added). In sum, the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan; whereas, in their role as plan administrator with concomitant fiduciary duties, the same corporate sponsor must act in the sole interest of plan participants and beneficiaries when administering plan provisions.

Here, Defendant was not acting in its role as a plan administrator when it amended the Plan. Rather, amending the Plan to provide enhanced retirement benefits constituted a business judgment that properly resided with corporate officers. Therefore,

Defendant's actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed. Indeed, the sole fiduciary duty implicated by the amendment was the duty owed to Defendant's stockholders. The Court views the subsequent payment of enhanced benefits to selected participants as merely Defendant's adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, Plaintiff fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions. Further, Plaintiff mistakenly relies on 29 U.S.C. § 1344(d)(1) to argue that only through the process of plan termination does an exception arise to the general principle that benefits must never, more than incidentally, inure to an employer as a party-in-interest. The process of plan termination allows this exception under the *fiduciary* responsibilities arising from plan administration. Hence, Plaintiff's argument is inapposite because the violations alleged arise from the amendment of the Plan and not from the subsequent administration of its terms.

Plaintiff's attempts to distinguish the cases cited above fall far short of the mark.[2] The factual distinctions relied upon are not significant in the cases themselves and are nonexistent in the relevant statutes. In short, Plaintiff offers no authority to support his argument that the distinctions culled are of legal significance.

Plaintiff also asserts that Defendant specifically violated its fiduciary duty in requiring those participants electing to receive enhanced retirement benefits to execute a release of employment

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[2] Plaintiff urges that the cases are distinguishable because, *inter alia*, they involve welfare rather than pension plans, unfunded or underfunded plans, amendments to terminate a plan, the initial creation and design of a plan, and/or amendments that only benefit the sponsor in an incidental manner.

related claims. The Court disagrees and finds that this release condition, as embodied in the Plan amendment, was a design feature not subject to the scrutiny of ERISA's fiduciary standards unless improperly administered. This very type of release provision has been upheld in a case involving an initial plan creation, *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988), and the Court finds no holding, statute, or compelling reason to prohibit its inclusion through the amendment of a continuing plan.[3]

Finally, Plaintiff contends that the doctrine of collateral estoppel precludes Defendant from contesting Plaintiff's fiduciary breach theory in relation to the Plan amendments. Plaintiff alleges that Defendants had a full and fair opportunity to litigate these same Plan amendment issues in a previous motion to dismiss in a similar cause of action. *Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990). The Court rejects this claim because the mere refusal by the prior court to grant the motion to dismiss did not adversely resolve any factual issues against Defendant, nor did it constitute a sufficiently firm or sufficiently final judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

[3] Plaintiff concedes that Defendant would have enjoyed broad discretion in both the establishment and termination of the Plan. The amending of a continuing plan seems similarly legitimate to the Court. Not surprisingly, the case law bears out this intuition. "The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, . . . its actions are not to be judged by fiduciary standards." *Musto*, 861 F.2d at 912 (emphasis added).

C. Alleged Violations Through Oral Misrepresentation

Plaintiff argues in his final claim that despite the express language of the Plan, he is entitled to additional benefits on account of Defendant's alleged oral misrepresentation of coverage.[4] Defendant responds that ERISA only permits payment of benefits under the written terms of the Plan and no other section of ERISA authorizes recovery on a promissory or equitable estoppel basis.

Plaintiff accurately observes that 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to bring suit against a plan "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." However, the Ninth Circuit has held that recovery must be based upon the terms of the plan and that alleged oral misrepresentations are insufficient under 29 U.S.C. § 1132(a)(1)(B). Basing its analysis on 29 U.S.C. § 1102(a)(1), which requires benefit plans to be maintained pursuant to a written agreement, the Ninth Circuit rejected a suit for additional plan benefits holding that to allow a claim based on estoppel would conflict with the statutory requirement. *Davidian v. So. Calif. Meat Cutters Union & Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988); *see also Hansen v. Western*

[4] Although the basis for this claim is unclear, regardless of whether Plaintiff intended to bring this allegation under ERISA or state common law, ERISA explicitly preempts state laws to the extent that they relate to any employee benefit plan not exempt from federal regulation. 29 U.S.C. §§ 1144. Further, cases in the Ninth Circuit have consistently held that ERISA preempts state law theories of recovery. *E.g. Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) (holding that ERISA preempts a state law claim based on alleged oral misrepresentation by an employer as to the level of benefits). Therefore, only three statutory grounds, discussed *infra*, survive as conceivable foundations for recovery: 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), and 1132(a)(3).

Greyhound Retirement Plan, 859 F.2d 779, 781 (9th Cir. 1988). In addition, there is no jurisdictional basis in this case for a claim under § 1132(a)(1)(B) because Plaintiff is not suing the Plan.

Second, although 29 U.S.C. § 1132(a)(2) permits a claim for equitable relief founded on a violation of fiduciary duty, the Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 477 U.S. 134, 142, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985), that any amounts recovered under § 1132(a)(2) must be paid to a plan, not to an individual participant or beneficiary. In this action, recovery under § 1132(a)(2) is untenable because Plaintiff's oral misrepresentation claim is brought solely in his individual capacity, not on behalf of the Plan.

Finally, while 29 U.S.C. § 1132(a)(3) permits an action for equitable relief to enforce the terms of a plan, the Ninth Circuit has held that a suit for fiduciary breach may only be brought if recovery would inure to the benefit of the plan as a whole and not to individual participants. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991). Again, Plaintiff brings his oral misrepresentation claim in his individual capacity and, thus, § 1132(a)(3) does not apply.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss in its entirety, and DISMISSES Plaintiff's Complaint WITH PREJUDICE for failure to state a

claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

DATED: July 31, 1992

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

STATUTORY APPENDIX

Employment Retirement Income Security Act

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) 36a

§ 406(a), 29 U.S.C. § 1106(a) 37a

Omnibus Budget Reconciliation Act of 1986

§ 9201, 29 U.S.C. § 623(i)(1) 38a

§ 9202(a)(2), 29 U.S.C. § 1054(b)(1)(H)(i) 38a

§ 9203(A) 39a

§ 9204, 29 U.S.C. § 623 note 39a

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the

administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

ERISA § 406(a), 29 U.S.C. § 1106(a)

Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect --

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

OBRA 1986 § 9201, 100 Stat. 1973-74 (1986),
***codified at* 29 U.S.C. § 623(i)(1)**

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end the following new subsection:

"(i)(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

"(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

"(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

"(2) . . ."

OBRA 1986 § 9202(a)(2), 100 Stat. 1975 (1986),
***codified at* 29 U.S.C. § 1054(b)(1)(H)(i)**

Defined Benefit Plans -- Section 204(b)(1) of [ERISA] is amended by adding at the end thereof the following subparagraphs:

"(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's

benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

"(ii) . . ."

OBRA 1986, § 9203(a), 100 Stat. 1979 (1986)

Repeal of Provisions Permitting Certain Plans to Exclude Older Employees from Plan Participation on the Basis of Age --

(1) ERISA amendment -- Section 202(a)(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1052(a)(2)) is amended by striking out "unless --" and all that follows and inserting in lieu thereof a period.

(2) IRC amendment -- Section 410(a)(2) of the Internal Revenue Code of 1986 (relating to maximum age conditions) is amended by striking out "unless --" and all that follows and inserting in lieu thereof a period.

OBRA 1986 § 9204, 100 Stat. 1979-80 (1986),
***codified at* 29 U.S.C. § 623 note**

(a) Applicability to Employees with Service after 1988 --

(1) In General -- The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

(2) . . . .

(b) Applicability of Amendments Relating to Normal Retirement Age -- The amendments made by section 9203 shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date.

(c) . . . .

(2)

No. 95-809

In The
Supreme Court of the United States
October Term, 1995

LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FUHRMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; and W.T. VINCENT,

Petitioners,

vs.

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

Respondent-Plaintiffs restate the Questions Presented in the Petition as follows:

1. Whether the Ninth Circuit correctly held that the named fiduciaries of a pension plan engaged in a prohibited transaction in violation of Section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), when they caused the plan to pay assets held in trust in exchange for mandatory waivers of all employment-related claims which could be brought against Lockheed, a party-in-interest and a named plan fiduciary.

2. Whether the Ninth Circuit correctly applied the legal standard this Court enunciated in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994) in holding that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA") to eradicate age discrimination, requires Lockheed to calculate pension benefits for older workers by including all years of service regardless of age, including those years when an employee was excluded from plan participation because of age.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

A. The "Prohibited Transaction" Question 1

B. The "OBRA 1986" Question 5

REASONS FOR DENYING THE WRIT 7

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S HOLDING THAT PETITIONERS VIOLATED SECTION 406 BY AMENDING THE PLAN DOCUMENT TO CAUSE THE PLAN TO ENGAGE IN PROHIBITED TRANSACTIONS 9

A. The Ninth Circuit Invalidated Plan Provisions Which Violated Substantive Terms of ERISA, Not Lawful Plan Amendments Imposing Eligibility Requirements 9

B. Far From Demonstrating An Intolerable Split Among the Circuits, Petitioners Cannot Point to A Single Case Which Conflicts With the Ninth Circuit's Decision Below 14

C. No Compelling Reason Exists For Granting Review 17

TABLE OF CONTENTS – Continued

Page

II. THERE IS NO REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S INTERPRETATION OF OBRA 1986 BECAUSE THE COURT OF APPEAL PROPERLY APPLIED THIS COURT'S ANALYSIS IN *LANDGRAF* AND ISSUED A RULING CONSISTENT WITH IRS PRONOUNCEMENTS ON A QUESTION WHOSE IMPACT IS VERY LIMITED AND DISSIPATES OVER TIME 21

A. Since the Court of Appeals Cited To and Applied This Court's Ruling in *Landgraf*, Petitioners' Challenge Amounts To A Quarrel With The Ninth Circuit's Application of A Properly Stated Rule of Law 21

B. Relevant Pronouncements of the Internal Revenue Service, Entitled to Deference, Are Consistent With The Ninth Circuit's Interpretation of OBRA 1986 27

C. The OBRA 1986 Question Is A Matter Of Minimal Import Which Will Affect A Very Limited Number Of Pensioners For A Short Period of Time 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Federal Cases

Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987) 16

Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993) 17

Averhart v. U.S. West Management Pension Plan, 46 F.2d 1480 (10th Cir. 1994) 11, 13, 15

Belade v. ITT Corp., 909 F.2d 736 (2d Cir. 1990) . . . 13, 15

Cirillo v. Arco Chemical Co., 862 F.2d 448 (3rd Cir. 1988) 17

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S.Ct. 1223, 131 L.Ed. 2d 94 (1995) 10, 11, 15

Harlan v. Sohio Petroleum Co., 677 F.Supp. 1021 (N.D.Cal. 1988) 17

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) 15

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 11, 13, 15

Johnson v. Georgia-Pacific Corporation, 19 F.3d 1184 (7th Cir. 1994) 12, 13, 16

Landgraf v. USI Film Prods., 114 S.Ct. 1483 (1994) *passim*

Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454 (6th Cir. 1984) 11, 14, 15

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988) 15, 16

TABLE OF AUTHORITIES – Continued

Page

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986) 16

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 2d 490 (1983) 13

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) 13, 15

Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983) 15

United Mine Workers of Am. Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982) 5, 18

Statutes, Regulations and Rules

Age Discrimination in Employment Act ("ADEA"), § 4, 29 U.S.C. § 623(j)(1)(A) 6

Employee Retirement Income Security Act of 1974 ("ERISA")

Section 2, 29 U.S.C. § 1002 12

Section 204, 29 U.S.C. § 1054 6

Section 403, 29 U.S.C. § 1103 4

Section 404, 29 U.S.C. § 1104 . . . . . 3, 5, 10, 15, 17

Section 406, 29 U.S.C. § 1106 . . . . . *passim*

Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat. 1979 (1986) . . . . . *passim*

IRS Notice 88-126, 1988-2 C.B. 538 (1988) 27, 28

Treas. Regs. § 1.411(b)-2, 53 Fed. Reg. 11, 877 (1988) 27

TABLE OF AUTHORITIES – Continued

Page

Treas. Regs. §§ 1.401(a)(4)-4(b)(2)(ii)(B) 19

Rule 10(c) of the Supreme Court Rules 21

Rule 12(b)(6) of the Federal Rules of Civil Procedure 1

MISCELLANEOUS

General Accounting Office, "Use of Waivers by Large Companies Offering Exit Incentives to Employees," GAO/HRD 89-87 (1989) 19

Grant, The "Open Window" – Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10, 15 (March, 1991) 20

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondents, Paul L. Spink, *et al.*, respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case, which is reprinted at pages 1a-21a in Petitioners' Appendix.[1]

STATEMENT OF THE CASE

Petitioners misrepresent and omit key facts and distort the ruling of the Ninth Circuit which they seek to have this Court review. Accordingly, Respondents will correct herein the incomplete and inaccurate depiction of this case presented to the Court with regard to each Question Presented.

A. The "Prohibited Transaction" Question

Factual Background. Because it reversed the district court's dismissal of Respondents' complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Ninth Circuit's ruling was based on the factual allegations of the complaint, as supplemented by the plan documents which were presented to the district court in connection with the motion to dismiss. The pertinent factual allegations are accurately set forth in the Ninth Circuit's opinion at pages 2a-5a of the Petition's Appendix.

In setting forth the facts pertinent to a review of the first Question Presented, however, Lockheed obscures the fact that all the key respondents here are "named fiduciaries" under the

[1] Throughout this Opposition, the following abbreviations are used: "ER" (Excerpts of Record filed with the Ninth Circuit); "CR" with number (Clerk's Record, with reference to the docket number of the document; the trial court's docket sheet may be found at pages 58-59 of the Excerpts of Record); "Pet." (Defendants' Petition); "Pet. App." (Appendix attached to Defendants' Petition).

terms of the pension plan, distorts the nature and scope of the waiver it imposed on employees seeking early retirement and implies incorrectly that Respondent, Paul L. Spink, was somehow a disinterested bystander neither eligible for enhanced pension benefits nor harmed by Lockheed's unlawful conduct. Because of these misrepresentations, Respondents will briefly set forth the actual facts underlying their claims so as to correct the false impression created by the Petition.

Petitioner Lockheed Corporation is not only the plan sponsor of the Lockheed Retirement Plan for Certain Salaried Employees ("Plan") but also a "named fiduciary" under the terms of the Plan, and exercises its authority as such by resolution of its Board of Directors. (ER 4; CR 7, at p. 126). Lockheed and its officers, Petitioners Tellep, Fuhrman, and Marafino, are all "parties in interest" and "fiduciaries" within the meaning of ERISA. (ER 4-5). The remaining petitioners are all members of the Retirement Plan Committee of the Plan and as such are also "named fiduciaries" under the Plan. (ER 5-7; CR 7 at pp. 126-127).

All the conduct leading to the prohibited transaction here was undertaken by named fiduciaries directly. First, Lockheed amended the Plan to include unlawful provisions which caused the Plan to spend assets held in trust in exchange for broad waivers of all employment-related claims against Lockheed. Then, members of the Plan Committee administered the Plan according to these illegal terms, directly using plan assets for the benefit of Lockheed.

Lockheed passed Plan amendments at a Board of Directors meeting on May 8, 1990, creating a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"), which were made available to certain employees until June 30, 1990. Under the SRO and VRP provisions of the Plan, eligible employees were offered the retirement incentive of increased pension benefits – paid for out of the plan assets held in trust – in exchange for a mandatory agreement to release and discharge Lockheed from

virtually all employment-related claims the employee might have against the company.[2]

Although eligible to elect the SRO option, Spink did not do so because he did not want to waive his right to assert his claim that Lockheed's calculation of his pension benefits constituted age discrimination under ERISA and the ADEA. After more than 11 years of continuous service with Lockheed, Spink retired on June 30, 1990 with a pension benefit of less than $100 per month because Petitioners only credited him with the last 18 months of his employment. (ER 8-9; Pet. App. 4a).

The Complaint. Petitioners attempt to obtain this Court's review of the first Question Presented by trying to mislead the Court into thinking that Respondents challenged Lockheed's scheme of buying waivers of employment-related claims with plan assets held in trust solely on the ground that this conduct constituted a breach of fiduciary duties under § 404(a)(1)(A)(i) of ERISA. (Pet. 3). But this is not true. The Complaint also asserts a claim attacking Lockheed's scheme as a prohibited transaction in which the Petitioners caused the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of Plan assets for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106(a)

[2] It is patently false for Lockheed to assert that this case involves the payment of early retirement benefits in exchange for a narrowly tailored "agreement releasing Lockheed from any claims relating to the employee's decision to elect early retirement." (Pet. 3). Instead, as alleged in the Complaint, each employee seeking benefits under Lockheed's early retirement programs was "required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims." (ER 20). Further, as the Ninth Circuit noted, the "all-encompassing" releases sought by Lockheed were described in the Plan as waiving "any claims . . . arising from termination of employment *or otherwise*." (Pet. App. 17a; CR 7 at p. 196 [emphasis added]).

and (b). (ER 23). Respondents also raised that the challenged scheme violated Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), which provides that "the assets of the plan shall never inure to the benefit of any employer." Thus, contrary to Petitioners' suggestion, Respondents raised three separate theories based on three distinct statutory provisions, not a single amorphous attack under ERISA's "fiduciary duty provisions." (Pet. 3).

The Ninth Circuit's Decision. In describing the court of appeals' ruling, Lockheed improperly reduces these three distinct statutory attacks to the single issue of whether a fiduciary breach occurred under Section 404. In order to accomplish this sleight-of-hand, Petitioners argue that the Ninth Circuit's ruling on the "prohibited transaction" claim under Section 406 was actually an improper determination on the "fiduciary breach" claim under Section 404.[3]

In fact, the Ninth Circuit ruled that the Petitioners – all of whom are named fiduciaries or their corporate officers – caused the plan to engage in a prohibited transaction in violation of Section 406[4] and explicitly declined to rule on Respondents' alternative theories that Petitioners' conduct

[3] Thus, Lockheed first states that the Ninth Circuit "held that Lockheed breached its fiduciary duty under ERISA by amending its Plan" and then concedes that the court of appeals "[s]pecifically" held that Lockheed had violated the prohibited transaction provision of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), because the Plan amendment 'provides for use of Plan assets to purchase a significant benefit for Lockheed.' " (Pet. 5-6).

[4] Section 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(D), provides, in relevant part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan, . . .

violated the anti-inurement clause of Section 403 and constituted a breach of fiduciary duties under Section 404.[5] What is more, the court of appeals' decision on the Section 406 claim is both straightforward and correct.

In essence, the Court held that, while the decision-making process of amending a pension plan may or may not be subject to analysis as a fiduciary act, the end product of the process – *i.e.*, the terms of the plan as amended – cannot violate the substantive provisions of ERISA. The Ninth Circuit explained:

> Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

(Pet. App. 16a). The court of appeals found the terms of the plan in effect after the amendment process violated ERISA's Section 406(a)(1)(D), because these terms made the payment of plan assets in exchange for a waiver of claims against Lockheed a part of plan administration, literally "caus[ing] [the] pension plan to engage in" thousands of transactions in which the assets of the plan were "use[d] by or for the benefit of a party in interest," Lockheed. (Pet. App. 16a ["[the provisions of Section 406(a)(1)(D)] prohibit plan documents from providing for use of plan funds to buy the releases."]).

B. The "OBRA 1986" Question

While Respondents have no quarrel with the Petition's recitation of the basic facts underlying their claims of age discrimination under ERISA and the ADEA, Petitioners take

[5] As to the claim that Petitioners' conduct violated their fiduciary duties under ERISA § 404(a)(1)(A)(i), the court of appeals refused to examine "whether an employer acts as a fiduciary when it amends the plan in a way which affects plan assets." (Pet. App. 14a, n.5).

pains to twist the holdings of both the district court and the Ninth Circuit in an apparent effort to demonstrate that the latter engaged in an extreme departure from established principles of statutory interpretation. As the following demonstrates, however, the two court decisions differ from one another not because of the radically different approach taken by one court or the other, but because the district court focussed on the wrong statutory provision.[6]

The district court's opinion. Respondents contend that Petitioners' practice of excluding certain years of service from benefit accrual calculations because of the employee's age at the time of hire constitutes a violation of the proscriptions under ERISA and the ADEA against maintaining a pension plan under which "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204, 29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i); ADEA § 4, 29 U.S.C. § 623(j)(1)(A).

The district court refused to focus on the statutory language on which Respondents' claims are based and undertook no serious analysis of the provision of OBRA 1986 which established the effective date for this prohibition. Instead the district court focussed primary attention on a completely different statutory provision – the clause outlawing age-based exclusion from plan participation – and its effective date to determine that the "plain language" of OBRA 1986 defeated Respondents' claims. (Pet. App. 26a-27a). In what can only be described as an absurd reversal of logic, the district court looked to "the OBRA 1986 amendments concerning benefit accrual" – the statutory provisions on which Respondents' claims are actually grounded – to "provide **analogous support** for the Court's conclusion" *only after* it had examined and relied on provisions of secondary relevance to reach that conclusion. (Pet. App. 27a [emphasis added]).

[6] The district court, of course, did not have the benefit of this Court's analysis in *Landgraf* and failed to apply the same analytical model.

The court of appeals' decision. The Ninth Circuit, on the other hand, centered its analysis on the substantive provisions which Respondents have sought to enforce. After acknowledging the controlling authority of this Court's decision in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, the Ninth Circuit determined that the retroactive intent of the relevant provisions of OBRA 1986 was "manifested in its text" by examining the substantive and effective date provisions of OBRA 1986 and the legislative history leading to its enactment. (Pet. App. 7a-8a n.1).

First, the court of appeals examined the prohibitions in Sections 9201 and 9202 against reducing "the rate of an employee's benefit accrual" and found that the "most natural reading" of these provisions "compels us to conclude that pre-enactment service years must be included in benefit accrual calculation." (Pet. App. 7a). Second, it rejected Petitioners' invitation to carve out an exception to the rule that the rate of benefit accrual may not be reduced because of age, because Congress delineated the only exceptions to the rule and there was no statutory basis for creating the additional exception urged by Petitioners. (*Id.* 9a-10a). Third, the Ninth Circuit's review of the legislative history and structure of OBRA 1986 produced further evidence that its reading of the plain language of the statute supported Respondents' claims. (*Id.* 10a-13a). Finally, while both parties urged the court to consider their view of regulatory pronouncements of the Internal Revenue Service, the Ninth Circuit "decline[d] to apply either of these interpretations" because the IRS never adopted final regulations based on its proposed interpretations. (*Id.* 13a).

REASONS FOR DENYING THE WRIT

Petitioners have not satisfied any of the criteria traditionally applied by this Court in determining whether to grant a Writ of Certiorari.

First, Petitioners fail to demonstrate any conflict at all, much less an intolerable one, among the circuits regarding the first question presented. Petitioners are unable to cite to a single case holding that named fiduciaries do not violate Section 406(a)(1)(D) when they amend the terms of a pension plan to build in a requirement that plan assets held in trust be used to benefit a party in interest. Most of the cases Petitioners rely on deal instead with the question of whether plan fiduciaries breach their fiduciary duties under a different provision of ERISA, Section 404, when they disregard the interests of participants and beneficiaries in passing a plan amendment which itself does not violate ERISA.

Second, there is no other reason warranting Supreme Court review of the first question. Petitioners point to nothing which shows that even one employer, other than Lockheed, has ever used plan assets held in trust to buy waivers of any and all employment-related claims in connection with the payment of early retirement benefits. Because Petitioners' conduct falls squarely within the prohibitions of Section 406 of ERISA, it is highly unlikely that employers who take seriously their responsibilities under the law would pattern their conduct after Lockheed's. Nor is there anything on which Petitioners rely which even implies that the ability to do so is necessary to advance any important public interest. On the contrary, the limited ruling in this case fosters ERISA's central purpose of preventing fiduciaries and parties in interest from diverting assets held in trust for plan participants and beneficiaries to their own purposes.

Third, Petitioners have not shown either a split among the circuits or a doctrinal conflict between the Ninth Circuit's resolution of the OBRA 1986 issue and relevant Supreme Court authority. At best, Petitioners' argument amounts to a groundless complaint that the Ninth Circuit misapplied the properly-stated rule of law enunciated in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, and, thus, is inappropriate for review by this Court.

Finally, there is no other compelling reason for this Court to review the OBRA 1986 issue. Petitioners are unable to show that the Ninth Circuit's interpretation will have any effect on the practices of other employers or on the smooth functioning of large pension plans. For example, Petitioners contend that a large number of plans are likely to have adopted the age-based reduction in benefit accrual computations which they did, by relying on IRS pronouncements purportedly permitting such a reduction. But it is simply untrue that the Ninth Circuit's decision is in conflict with IRS pronouncements on the issue. To the extent that other plans reasonably relied on the IRS in formulating the terms of their plan, those plans would conform to the standards enunciated by the Ninth Circuit.

Further, even if the court were to credit Petitioners' unsupported speculation that other companies perpetuated age distinctions in their benefit calculations after the passage of OBRA 1986 in the same way that Petitioners did, review by this Court would be unwarranted, not only because the Ninth Circuit's ruling is correct, but also because the issue raised is one which affects only a very tiny fraction of pension plan participants who worked and retired during a narrow window of time in the late 1980s and 1990s, and the decision will have virtually no impact on pension plan administration after these particular participants are deceased. Finally, the question has not been addressed by any other court of appeals and is not likely to recur.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S HOLDING THAT PETITIONERS VIOLATED SECTION 406 BY AMENDING THE PLAN DOCUMENT TO CAUSE THE PLAN TO ENGAGE IN PROHIBITED TRANSACTIONS.

A. The Ninth Circuit Invalidated Plan Provisions Which Violated Substantive Terms of ERISA, Not Lawful Plan Amendments Imposing Eligibility Requirements.

Shaping their argument to create an issue for review which does not actually exist, Petitioners assert that the Ninth

Circuit's decision "imposes fiduciary responsibilities upon an employer when it amends a plan," but they fail to identify the duty which has been wrongly foisted on them or what aspect of the process of amending the plan was deemed by the Ninth Circuit to be a breach of that fiduciary duty. The reason for this conspicuous void is that the Ninth Circuit did not rule one way or the other on this aspect of Respondents' complaint.

The fiduciary duties imposed under ERISA are set forth in Section 404, 29 U.S.C. § 1104. It is true that the complaint alleges that Petitioners violated several of its fiduciary duties under Section 404,[7] and that the district court dismissed those claims. (ER 22-23; Pet. App. 28a-32a). Although Respondents urged the court of appeals to do so, however, the Ninth Circuit declined to rule on or even discuss their arguments that Petitioners' conduct in amending the plan and implementing that amendment constituted a breach of their fiduciary duties under Section 404 of ERISA. (Pet. App. 14a, n.5).

Petitioners complain, nonetheless, that the Ninth Circuit's ruling interferes with their right to freely amend the plan document and refer to cases which purportedly stand for the proposition that employers such as Lockheed may amend a benefit plan under ERISA "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S.Ct. 1223, 1228, 131 L.Ed. 2d 94 (1995). But the issue here is neither the reason for the amendment, its timing, the motivation of those amending the plan, nor any other aspect of the amendment process itself.

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[7] In their complaint, Respondents charged Petitioners with breaching their fiduciary duty under Section 404(a)(1) to "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries"; their duty under Section 404(a)(1)(A)(i) to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries; their duty under Section 404(a)(1)(B) to discharge their duties with the care, skill, prudence and diligence under circumstances that a prudent person would employ under like circumstances; and their duty under Section 404(a)(1)(D) to act in compliance with the provisions in the Plan and Trust Agreement prohibiting use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries. (ER 22-23).

Instead, as the Ninth Circuit recognized, the central question raised by Respondents is whether the end product of that process – that is, the plan document as amended – violates a substantive provision of ERISA. In this case, the Ninth Circuit held that the amended plan document violated Section 406(a)(1)(D), by requiring the plan to engage in multiple transactions using plan assets held in trust for the benefit of a party in interest.

While they attack the Ninth Circuit's holding on grounds not addressed by the court of appeals, Petitioners are forced to acknowledge that their power to amend the plan is not unlimited. In fact, they explicitly admit that the power to amend may not be exercised to create plan provisions which violate the substantive terms of ERISA. (Pet. 7-8). Such a conclusion is compelled by virtually every case cited in the Petition.[8] As a result, the courts in those cases go beyond the initial question of whether the amendment process may be scrutinized as a fiduciary act to determine whether the plan document, as amended, violates any substantive provision of ERISA.[9]

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[8] *See, e.g., Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("[I]n general, an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, . . . , provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan."); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d 454, 457 (6th Cir. 1984) ("[A]n employer is free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated.").

[9] *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. at 1228 (Because ERISA does not "establish any minimum participation, vesting or funding requirements for welfare plans as it does for pension plans," the fact "that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA"); *Averhart v. U.S. West Management Pension Plan*, 46 F.2d 1480, 1488 (10th Cir. 1994) (holding not only that amendment is not a fiduciary act but also that the amended provisions do not violate ERISA).

This is true even in *Johnson v. Georgia-Pacific Corporation*, 19 F.3d 1184 (7th Cir. 1994) – a case which Petitioners showcase in their argument. (Pet. 9). In *Johnson*, the Board of Directors of the plan sponsor adopted a plan amendment in November, 1989 which provided that, in the event of a change in control of the corporation, benefits to current employees would be increased so as to exhaust the surplus assets and those increased benefits would be deemed vested immediately. Corporate control did change and, in March, 1990, the terms of the plan, as amended, provided increased and fully vested benefits to current employees. In response to a challenge by retirees who did not benefit from the amendment, the court of appeals looked first at the amendment process, then at the implementation of the amendment, and finally at the terms of the plan as amended.

With regard to the first issue, the court of appeals held that "when amending the plan in November, 1989 the defendants did not act as fiduciaries under ERISA." Turning next to the issue of whether the "implementation of the amendment in March, 1990" violated the provisions of ERISA, the court considered whether the increase and immediate vesting of benefits resulted in a breach of any ERISA prohibitions. Among the issues considered was whether the March, 1990 benefit increase "exchang[ed] one instrument or asset for another" so as to result in a "disposition" of assets within the definition of a "fiduciary" under 29 U.S.C. § 1002(21)(A), or whether it constituted an "exchange [of] assets between the trust and the employer" in violation of Section 406 of ERISA, 29 U.S.C. § 1106(a). Since no asset was exchanged for another or otherwise disposed of, the *Johnson* court ruled that the amendment did not violate these substantive provisions. *Id.*, at 1189.[10]

[10] Unlike in this case, the corporate officials who amended the plan in *Johnson* received no benefit for themselves or the plan sponsor in exchange for the enhanced benefits which went to employees in March, 1990. It may be said that they never received any "benefit" at all, since any "advantage" they may have obtained as a result of the initial amendment's deterrent impact on a takeover attempt was either lost or shown to be imaginary when corporate control in fact changed hands, despite the plan amendment.

Finally, the court of appeals addressed the retirees' argument that the terms of the plan as amended violated their rights under ERISA by denying them enhanced benefits which were provided to current employees. The *Johnson* court rejected this claim, relying on this Court's ruling in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896-7, 77 L.Ed. 2d 490 (1983) that "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Johnson*, 19 F.3d at 1190. Thus, far from conflicting with the Ninth Circuit's opinion here, *Johnson* provides implicit support by recognizing both that the amended plan must comply with ERISA's terms in order to pass muster and that a plan amendment which causes the plan to engage in a prohibited transaction violates ERISA.

It is extremely misleading for Petitioners to refer to the plan provisions which establish the early retirement program here as imposing only benign "eligibility criteria." The kinds of eligibility criteria which have been upheld by the courts are provisions, like the requirement of current employment status in *Johnson*, which themselves do not violate any substantive provision of ERISA. *E.g.*, *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment which provided enhanced retirement benefits to employees in certain divisions, while denying them to others); *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990) (attacking newly created retirement plan offering benefits only to certain full-time employees in designated departments).[11] While

[11] *See also Averhart v. U.S. West Management Pension Plan*, 46 F.3d at 1488 (challenge to providing benefits to employees eligible for Directors' Retirement Program but not to other employees); *Izzarelli v. Rexene Products Co.*, 24 F.3d at 1523 (challenge to amended plan amounts to argument that new terms benefitted some participants at the expense of

Petitioners imposed these sorts of eligibility criteria in connection with their 1990 early retirement programs, Respondents have never contested their right to do so.[12]

In sum, the Ninth Circuit did not issue any ruling on Petitioners' right to dictate legitimate eligibility requirements. Instead the court below reversed the district court's dismissal based on the narrow determination that the amended plan document itself violated ERISA by providing for numerous transactions in which plan assets held in trust were used to buy off employment-related claims against Party-in-Interest and Named Fiduciary Lockheed, in clear violation of the prohibition in Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

B. Far From Demonstrating An Intolerable Split Among the Circuits, Petitioners Cannot Point to A Single Case Which Conflicts With the Ninth Circuit's Decision Below.

On pages 10 through 11 of the Petition, Petitioners cite 10 cases decided by 8 different circuit courts in an effort to convince this Court that the Ninth Circuit's prohibited transaction ruling conflicts with virtually every appellate court which has addressed such an issue. A review of these cases, however, reveals that not one of them even involves a claim

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others); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d 454, 455 (6th Cir. 1984) (challenge to requirement that employees complete 5-month waiting period in order to receive benefits).

[12] To be considered an "Eligible Member" with respect to the 1990 early retirement program, an employee had to be a salaried employee on the payroll of certain identified Lockheed corporate entities on or after May 8, 1990, who reported to a particular Lockheed division, who would have qualified for early retirement by June 30, 1990, and who had received a written layoff notice on or before June 30, 1990. (CR 7 at pp. 194-195). Although these provisions set up eligibility criteria which distinguish between various classes of plan participants, Respondents do not challenge these provisions because, unlike the waiver requirement, they do not violate the substantive terms of ERISA.

by the plaintiffs that the employer, trustees or any other fiduciary violated Section 406(a)(1)(D), by using pension plan assets held in trust to benefit a party in interest, either by amending the plan to impose unlawful terms, by implementing such terms, or otherwise.

At the core of most of Petitioners' cases are claims under a completely different provision of ERISA, giving rise to rulings as to whether the defendant-employer breached its fiduciary duties under Section 404.[13] Further, many cases Petitioners wrongly point to as contrary to the Ninth Circuit's decision here do not even deal with pension plans where funds are held in trust, but rather involve welfare benefit plans which are unfunded and, thus, do not distribute funds which have been held in trust for plan participants and beneficiaries.[14] The crux of the present case, however, is the use

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[13] *See Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment as violative of existing plan provision and raising fiduciary breach claim under § 404); *Belade v. ITT Corp.*, 909 F.2d at 737 (§ 404 fiduciary breach claim); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158-59 (3d Cir. 1990) (claim under § 404(a)(1) for fiduciary breach, in addition to claim for benefits under the plan and allegation of reporting and disclosure violations); *Izzarelli v. Rexene Products Co.*, 24 F.3d at 1513 (claims brought under §§ 404 and 405 and to enforce the anti-cutback provision of § 204(g); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d at 456 (challenge of plan provision as arbitrary and capricious); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988) (claims for plan benefits and for breach of fiduciary duties); *Averhart v. U.S. West Management Pension Plan*, 46 F.3d at 1488 (claims to enforce the plan terms, attacking claim rejection as arbitrary, and for breach of fiduciary duties under § 404(a)(1).

[14] Unlike with pension plans, ERISA does not impose any minimum participation, vesting or funding requirements on welfare plans, so there is no issue of a separate fund which is held in trust. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. at 1228; *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1158-1162, esp. 1159 ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust."). *See also Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 411 (4th Cir. 1983) ("ERISA does

of pension funds held in trust to liquidate liabilities of a party in interest.[15]

In fact, the only case cited by Petitioners in which the court rules on a Section 406 claim in a pension plan setting is *Johnson v. Georgia-Pacific Corporation*, 19 F.3d 1184. As explained at more length above, none of the assets held in trust in *Johnson* were transferred to or used to benefit a party in interest, so the court naturally found no Section 406 violation.[16] Because the facts here are entirely different, *Johnson*

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not impress a trust upon [the employer's] corporate treasury for the payment of the contingent benefits" and "it is the unfunded nature of [the employer's] contingent liability that distinguishes this case from the cases, . . . where courts have found that fiduciaries have violated § 1106."); *Musto v. American General Corp.*, 861 F.2d at 901 n.2, 911; *Anderson v. John Morrell & Co.*, 830 F.2d 872, 875-876 (8th Cir. 1987); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986).

[15] Petitioners admit that they could not pay out pension funds to "settle lawsuits against Lockheed that were unrelated to pension benefits," implicitly recognizing that by liquidating these liabilities with plan assets they would be engaging in prohibited transactions to benefit a party in interest. Such settlement would likely exchange pension funds for broad waivers of existing and potential claims. At the same time, however, Petitioners attempt to argue that there was no "transfer of assets" to Lockheed because pension funds held in trust were paid only to plan participants as benefits. (Pet. 13-14). This argument exposes the true issue Petitioners would have this Court decide – whether they can evade the proscriptions of ERISA's prohibited transactions provisions by calling a payment out of the pension trust a "benefit" even though it would be illegal if it were called a payment in settlement of potential or actual claims. Indeed counsel for Petitioners argued to the Ninth Circuit that it would be proper for the plan to identify persons with lawsuits against Lockheed and amend the plan to provide them with enhanced benefits in exchange for an agreement to dismiss their lawsuits.

[16] *Phillips v. Amoco Oil Co.*, 799 F.2d at 1471-72 is even farther afield, holding as it does that a transaction which affects "contingent and non-vested future retirement interests" in a welfare plan cannot be a prohibited transaction under Section 406 because it does not involve "monies, property or fiscal assets" held in trust by the plan.

is inapposite and, thus, cannot be said to create any conflict with the Ninth Circuit's decision in this case.

Contrary to their suggestion, moreover, there are no cases which support Petitioners' use of waivers in this context. *Astor v. International Business Machines Corp.*, 7 F.3d 533, 534-6 (6th Cir. 1993) does not conflict with the Ninth Circuit's decision here, not only because it involved a newly-funded early retirement program rather than the payment of existing pension plan assets held in trust,[17] but also because the plaintiffs in *Astor* never challenged the waiver requirement, instead claiming fraudulent inducement to accept the program. *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3rd Cir. 1988) is even farther afield, since it is not a case brought under ERISA at all and deals solely with whether the employee executed a "knowing and voluntary" waiver of his ADEA rights.

C. No Compelling Reason Exists For Granting Review.

Despite the narrow and clearly correct ruling of the Ninth Circuit, Petitioners project that the decision below will have a cataclysmic impact on labor relations, the discretion of employers to make business decisions, and the smooth administration of pension plans throughout the nation. These projections are wildly exaggerated or downright fanciful.

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[17] The same is true of *Harlan v. Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D.Cal. 1988), where the employer implemented a new welfare benefit plan for employees who were involuntarily terminated and required releases as a condition of participation. In finding that requiring such a waiver did not violate § 404(a)(1)(A) of ERISA, the *Harlan* court explained that § 404 does not apply to the "creation" of a plan and carefully noted that "[t]his is not a situation where the plan had already been in effect, and the defendant [employer] later sought to condition the benefits on a later required release." *Id.*, 677 F.Supp. at 1026.

Petitioners argue that the Ninth Circuit's "prohibited transaction" ruling here will interfere with employers' ability to "add new benefits or increase present benefits" for a wide spectrum of "corporate purposes." (Pet. 14). But the decision below does not challenge the *purpose* of the plan amendment or any fiduciary's *motivation* in establishing it. In light of the Ninth Circuit's statement that "Lockheed is free to disregard employees' interest in amending the Plan," it cannot be said that the decision below places any limitation on an employer's ability to amend its plan as part of the settlement of a collective bargaining dispute, to avoid a strike, or in the other contexts raised by Petitioners. (Pet. App. 16a). The decision below simply affirms established Supreme Court law that the terms of any such amendment cannot violate substantive provisions of ERISA. *E.g.*, *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. at 575.

Nor is there anything in the Ninth Circuit's decision which suggests that an employer will engage in a prohibited transaction whenever "it amends its plan to encourage voluntary early retirement" or otherwise provides an early retirement window to induce retirement with pay in lieu of layoff. (Pet. 15). The opinion below does not outlaw any form of early retirement program *except* those which require employees to relinquish all rights they may have to sue their employer in order to obtain enhanced benefits which are paid out of pension funds held in trust.[18] It does not bar employers from providing enhanced benefits out of plan assets without requiring a waiver of all claims. Nor does it prevent an employer from financing such a program with its own assets.[19] Because of the narrow scope of the Ninth Circuit's

[18] The Ninth Circuit did not decide whether the release was impermissibly broad in its scope, whether such a release could be obtained in connection with enhanced benefits paid out of corporate assets, or whether a more narrow release of claims would be permissible. (Pet. App. 17a-18a).

[19] For this reason, there is no conflict between the Ninth Circuit's ruling and Treasury regulations referring to the use of covenants not to

ruling, Petitioners' concern about the continued vitality of early retirement programs as a method of corporate downsizing is misplaced. (Pet. 26).

In fact, the very authorities relied upon by Petitioners reveal that the likely impact of the Ninth Circuit's ruling is quite small. While it found that 80 percent of the Fortune 100 companies offered some sort of early retirement program at least one year during the period from 1979 through 1988, the U.S. Government Accounting Office (GAO) determined that only 28 percent of the employers with such programs required participants to sign waivers **of any sort** in order to receive benefits. *See* General Accounting Office Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD 89-87 at 4-5 (1989). More significantly, only about 5 percent of the 198,281 employees who elected to leave under early retirement programs during the relevant ten years had to sign waivers in order to receive enhanced benefits under an existing pension plan, as opposed to a newly created severance package program, and there is no indication in the report as to whether these enhanced benefits were paid out of pension assets held in trust or by a new contribution by

compete and waivers. (Pet. 15). Even if it were correct to say, as Petitioners do, that these regulations "expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers" – which they do not – nothing in the regulations indicates that any covenant or waiver would be valid if it were required in connection with the distribution of benefits paid out of funds held in trust. Instead, the regulations cited by Petitioners list a series of possible circumstances and indicates that they will not be considered in determining if a benefit plan has violated ERISA's *nondiscrimination requirements*. *E.g.*, Treas. Reg. §§ 1.401(a)(4)-4(b)(2)(ii)(B).

the sponsoring employer.[20] *Id.*, at 7. Even assuming, *arguendo*, that all these benefits were paid out of assets held in trust and all of the waivers were as all-inclusive as those used by Petitioners here, according to the authorities cited in the Petition, the practice at issue here affected less than 10,000 employees out of a workforce of approximately 8.3 million over a ten-year period. *Id.*, at 4.

In sum, because of its narrow holding, the Ninth Circuit's decision will have very little effect on early retirement incentive programs as they are used by the vast majority of businesses in the United States. While it seems that such programs are used by a number of companies and that a small proportion of them request waivers in exchange for the early retirement benefits, it is clear that few employers have followed Lockheed's lead by dipping into plan assets held in trust – as opposed to their own corporate funds – to buy waivers of any and all employment-related claims in connection with the payment of such benefits.

Even if it were true, moreover, that numerous employers wished to adopt the early retirement scheme devised by Lockheed, there are strong policy reasons for upholding the prohibition recognized by the Ninth Circuit in this case. The law should not countenance a corporate strategy which uses plan assets held in trust as if they belonged in the coffers of the plan sponsor, merely because the strategy is accomplished by formal amendment of the plan document or by calling the transfer of assets a payment of benefits. Such a ruling would eviscerate the force of Section 406 and effectively gut the prohibitions against improper use of trust funds which constitute the foundation not only of ERISA but of long-recognized common law trust principles.

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[20] Petitioners' reliance on the Grant article poses the same problems since the fact that waivers were used in an early retirement program does not mean that the benefits are paid out of pension funds held in trust. (Pet. 27-8 *quoting* Grant, The "Open Window" – Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10, 15 (March, 1991)).

II. THERE IS NO REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S INTERPRETATION OF OBRA 1986 BECAUSE THE COURT OF APPEAL PROPERLY APPLIED THIS COURT'S ANALYSIS IN *LANDGRAF* AND ISSUED A RULING CONSISTENT WITH IRS PRONOUNCEMENTS ON A QUESTION WHOSE IMPACT IS VERY LIMITED AND DISSIPATES OVER TIME.

A. Since the Court of Appeals Cited To and Applied This Court's Ruling in *Landgraf*, Petitioners' Challenge Amounts To A Quarrel With The Ninth Circuit's Application of A Properly Stated Rule of Law.

Trying to convince this Court to review the Ninth Circuit's interpretation of OBRA 1986, Petitioners claim that the decision below is "flatly inconsistent" with this Court's ruling in *Landgraf v. USI Film Products*, 114 S.Ct. 1483, within the meaning of Rule 10(c) of the Rules of the Supreme Court. Perusal of the Ninth Circuit's decision and Petitioners' complaints about that decision reveals, however, that Petitioners are really claiming that the court of appeals "misappli[ed] . . . a properly stated rule of law." Rather that unmasking a doctrinal disagreement of any sort, the Petition quibbles with the Ninth Circuit's interpretation of the key provision on which Respondents' claims are based, ignores the Ninth Circuit's reliance on statutory language and legislative history which supports its conclusion, and improperly transforms one aspect of this Court's analysis of unique statutory provisions in *Landgraf* into a broad, inflexible rule of statutory construction. But a comparison of *Landgraf* and the Ninth Circuit's analysis below makes clear that the court of appeals applied the principles of statutory construction enunciated by this Court.

The precise issue before the Court in *Landgraf* was whether provisions of the Civil Rights Act of 1991 which added a new damages remedy and a concomitant right to jury trial should be applied to a Title VII case that was pending on appeal when the statute was enacted. *Ibid.*, 114 S.Ct. at 1488.

After detailed examination of its previous precedents interpreting statutes which were claimed to have retroactive application in some manner (*id.*, at 1496-1504), this Court laid out a blueprint for judicial analysis of the issue:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statutes would have retroactive effect. . . . If the statute would operate retroactively, our traditional presumption [against retroactive application] teaches us that it does not govern absent clear congressional intent favoring such a result.

Id., at 1505.

The *Landgraf* Court applied this 3-step analytical model in its evaluation of the 1991 Act. The Court explained that "the first question" in its inquiry was "whether the statutory text on which petitioner relies manifests an intent that the 1991 Act should be applied to cases that arose and went to trial before its enactment." *Id.*, at 1492. The Court analyzed the language of the substantive statutes relied on by the petitioners, the effective date provisions, their relationship to other provisions in the 1991 Act, their significance in light of similar provisions rejected in earlier versions of the Act, and indications of Congressional intent which emerge from the legislative history. Based on this inquiry, the Court concluded there was no guidance in the language of the statute itself or in the legislative history illuminating that statute as to whether the Act's provisions should apply to cases on appeal. *Id.*, at 1490-96.

Turning to the second step, the Court then evaluated whether the particular provisions at issue in the case operated retroactively so as to give rise to the presumption against retroactivity. Finding they did, the Court applied the presumption because, at the third step of its analysis, it found "no

clear evidence of congressional intent that § 102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment." *Id.*, at 1508.

The Ninth Circuit recognized the controlling force of this Court's holding in *Landgraf*. (Pet. App. 8a, n.1). Because the parties debated the issue of whether Respondents' argument amounted to a request for retroactive application, the court noted in a footnote that, "to the extent [its] interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively."[21] The court explained, however, that "this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute *manifested in its text*." (*Id.* [emphasis added], *citing to Landgraf*, 114 S.Ct. at 1492). Thus, the Ninth Circuit followed the *Landgraf* model fashioned by this Court, but did not proceed past the first step because it found that "Congress ha[d] expressly prescribed the statute's proper reach." *Id.*, at 1505. Thus, contrary to Petitioners' suggestion, there was no need for the court of appeals "to resort to judicial default rules" by applying the presumption against retroactivity "absent clear congressional intent favoring such a result." *Id.*

Nor can it be said that the Ninth Circuit departed from this Court's method of evaluating "the statute's proper reach." Like the *Landgraf* Court, the Ninth Circuit began by examining the substantive provisions relied on by Respondents, holding that "the most natural reading" of OBRA 1986's prohibitions on reducing "the rate of an employee's benefit accrual" because of age "compels us to conclude that pre-enactment service years must be included in benefit accrual

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[21] These comments constituted a rejection of Respondents' argument below that the construction they proposed did not result in a truly retroactive application, but only in the current application of a benefit calculation formula based on factors, like years of service or level of compensation, which made reference to events from the past.

calculation." (Pet. App. 5a-9a, *esp.* 7a).[22] Recognizing that, under Lockheed's plan, Respondents were credited with fewer years of service because of their age, the court of appeals found that this age-based reduction comes within the "essence of OBRA's express prohibitions" and implied that allowing a rate reduction to be accomplished indirectly by discounting the number of credited service years would eviscerate the force of the OBRA 1986 prohibition. (*Id.* 9a).[23]

[22] Revealing what really bothers them about the Ninth Circuit's decision, Petitioners include a lengthy attack on that court's conclusion that the "natural reading" of OBRA 1986's prohibition on reducing "the rate of an employee's benefit accrual" supports Respondents' claims. (Pet. 19-20). At the core of this attack is not a doctrinal conflict with *Landgraf* but Petitioners' desire that the court of appeals impose a narrow construction on the word "rate," so the statute would preclude age discrimination through the manipulation of only certain factors in a benefit accrual formula but not others. Because there are a myriad of ways such a formula can be altered to discriminate against older workers, however, the Ninth Circuit recognized that *any* type of change in the formula which constitutes a reduction based on age violates OBRA 1986. (Pet. App. 9a).

This does not mean, as Petitioners suggest, that the Ninth Circuit was confused about the difference between the rate of benefit accrual and the total benefits accrued. The formula described in the Petition illustrates the problem the Ninth Circuit sought to obviate. That formula has three factors: a percentage figure which is applied to final compensation, a final compensation figure, and the number of years of service. Petitioners say that the "rate" of benefit accrual is the percentage figure, that this is the only "rate" which may not be reduced because of age. (Pet. 20 n.12). In fact, however, the benefit accrual formula may be reduced by manipulating any of the 3 factors, *e.g.*, by cutting out certain years based on age from the "years of service" calculation, by disregarding certain compensation levels for years when the participant was 61 or older, or by applying a different percentage figure for years worked after age 61. To allow such manipulation of the benefit accrual formula would eviscerate OBRA 1986's prohibition of aged-based discrimination in benefit accrual.

[23] The Ninth Circuit rejected Petitioners' invitation to carve out an exception for an aged-based reduction based on the previously lawful exclusion of older workers from the plan, because the court found no justification for the exception in the statutory language. (Pet. App. 9a-10a).

As in *Landgraf*, the Ninth Circuit also probed the legislative history and determined that it "verifie[d] [the court's] reading of the language of the OBRA 1986 amendments." (Pet. App. 10a). Following the lead of the *Landgraf* court, the Ninth Circuit looked at the relevant effective date clause, which is § 9204(a)(1) of OBRA 1986, and its relation to an earlier version of this clause which would have limited OBRA 1986's prohibition on age-based benefit calculations to certain "accrual computation periods." (*Landgraf*, 114 S.Ct. at 1493-1494; Pet. App. 10a-11a). Based on this comparison, the Ninth Circuit determined that Congress intended no limit on the years of service to be included in benefit calculations since it excised plain language specifically limiting benefit accrual periods in favor of language imposing no such restrictions and making the prohibition broadly applicable to all employees "who have one hour of service in any plan year to which the amendments apply." (Pet. App. 11a, *quoting* OBRA 1986, § 9204(a)(1)).

The Ninth Circuit also scrutinized the effective date clause for the benefit accrual provisions in relation to the effective date clause for OBRA 1986's provision outlawing age-based exclusion from plan participation. The court of appeals found language in § 9204(b) which Congress could have used to restrict the application of the benefit accrual provisions to post-enactment years,[24] but which it declined to use in the immediately adjacent § 9204(a), and inferred from that comparison that Congress did not intend the same restriction to apply to the benefit accrual provisions.[25] The court

[24] Section 9204(b) provides that the amendments requiring non-discriminatory participation "shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date."

[25] Petitioners contend that the Ninth Circuit's comparison of subsections (a) and (b) of § 9204 conflicts with this Court's supposed holding in *Landgraf* that "'negative inferences' made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute

also rejected Petitioners' suggestion below that subsection (b) should be read to impose a restrictive application on the benefit accrual provisions controlled by the effective date clause in subsection (a), logically concluding that there was no reason for Congress to impose such a limitation indirectly through subsection (b) when it could have inserted an explicit restriction in subsection (a). (Pet. App. 11a-12a).[26]

In its evaluation of Respondents' claims that Petitioners "reduc[ed] . . . the rate of [their] benefit accrual because of age," the Ninth Circuit not only followed the analytical framework outlined by this Court in *Landgraf*, it also patterned the more intricate aspects of its statutory interpretation

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clear legislative intent of retroactivity." (Pet. 22). *Landgraf* simply does not stand for such a proposition. Instead the court in *Landgraf* ruled that, in light of the fact that explicit retroactivity language existed in a prior version of the Civil Rights Act and that it was mentioned as a reason for the prior bill's veto, and given the broad coverage of the Act, specific prospectivity language in two relatively minor provisions in a bill with more than 50 sections did not necessarily imbue a nondescript provision requiring that the Act be "effective upon enactment" with retroactive meaning. *Id.*, 114 S.Ct. at 1493-94. By contrast, the Ninth Circuit here compared the only two effective date clauses, sitting side-by-side in a 4-section bill, and came to a conclusion which was compatible with its reading of the substantive provision at issue and Congress's rejection of a previous version which explicitly limited the retroactive application of that provision.

[26] Petitioners argue that the language differences in the two subsections derive from congressional awareness of pending litigation claiming that the reductions in benefit accrual based on age were illegal under the ADEA, and a desire by Congress to "leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) for the then-ongoing litigation." (Pet. 22-23). There is nothing, however, in the statute or the legislative history which supports this speculation about congressional motives. Nor do Petitioners explain why this historical context would have prompted Congress to choose the language it did rather than explicitly stating that the new provisions only apply prospectively and, thus, do not interfere with any judicial interpretations of existing law.

after the analysis pursued by the *Landgraf* court. Since Petitioners' argument that the Ninth Circuit's ruling creates a doctrinal conflict with Supreme Court law boils down to a misguided complaint with the lower court's careful application of the higher court's enunciated principles, further review by this Court is plainly unwarranted.

B. Relevant Pronouncements of the Internal Revenue Service, Entitled to Deference, Are Consistent With The Ninth Circuit's Interpretation of OBRA 1986.

Petitioners also protest the Ninth Circuit's refusal to interpret pronouncements of the Internal Revenue Service (IRS) as consistent with their position and entitled to deference in construing the provisions of OBRA 1986. (Pet. 23-25). While the Ninth Circuit clearly could not defer to regulations which conflict with OBRA 1986's meaning as "manifested in its text," we address Petitioners' flawed argument because they claim that many employers have detrimentally relied on these IRS pronouncements about the application of OBRA 1986. Since pertinent IRS pronouncements are **consistent** with the Ninth Circuit's determination that no years of service may be disregarded in benefit calculations because of the employee's previous exclusion based on age, however, there is no concern that the decision here will upset the administration of plans whose administrators relied on the IRS in fashioning their plans.

On April 11, 1988, the IRS published proposed regulations setting forth the general rule that pre-enactment years of service are to be included in benefit accrual calculations but carving out an exception for persons, like Respondents, who were previously excluded from participation because of age. Prop. Treas. Regs. § 1.411(b)-2, 53 Fed. Reg. 11, 877 (1988). These proposed regulations were never issued as final regulations.

Instead, on December 9, 1988, the IRS issued Notice 88-126 announcing its intent to issue final regulations which

"will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988) completed by a participant in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988." IRS Notice 88-126, 1988-2 C.B. 538 (1988). There is nothing in the IRS notice which indicates an intent to carve out an exception to this rule for participants who were once lawfully excluded from participation because of their age.

What is more, the notice explicitly provides that, while "[t]axpayers may rely on this notice until the final regulations are published," "[n]o inference should be drawn, . . . , regarding any issue not specifically addressed in this notice." *Id.* The broad directive to include all years of service in any benefit calculation is "specifically addressed" in the notice, but Petitioners' proposed exception is not. Thus, reasonable reliance on this IRS notice would lead a taxpayer to include all service years in benefit accrual calculations. Given the lack of final regulations, the limited substantive scope of the IRS notice, and the absence of statutory support, carving out the exception taken by Petitioners is not only an unwarranted action under the IRS notice but a legal gamble for which the law provides no insurance.

C. The OBRA 1986 Question Is A Matter Of Minimal Import Which Will Affect A Very Limited Number Of Pensioners For A Short Period of Time.

Petitioners posit that the Ninth Circuit's ruling on OBRA 1986's application will have a "nationwide impact" on "employers and pension plans nationwide" who will now have to provide additional benefits to "thousands of employees" "at great cost" to themselves, but none of these bald assertions are supported by any authority. (Pet. 29). Looking merely at the legal parameters of the issue, however, it is clear that the ruling's impact will be small in scope and limited in duration, and that the issue presented – which has never been addressed

by any other circuit court – will likely never recur because of its rapidly passing significance. Thus, there is no reason for this Court to devote its resources to reviewing this issue.

Given the IRS pronouncement requiring that all years of service be included in benefit calculation under the OBRA 1986 amendments, the number of employers who risked violation of this rule is likely to be exceedingly small. Further, the scope of employees affected by the narrow issue presented here is very narrow. The only persons impacted by the Ninth Circuit's ruling are employees (a) who started working for an employer before the first day of the pension plan year beginning sometime in 1988; (b) who were within 5 years of normal retirement age – usually after the age of 60 – at the time they started working; (c) who continued to work at least one day in the 1988 plan year and, thus, became plan participants under OBRA 1986; (d) whose employer had a pension plan which excluded such workers from plan participation because of their age; and (e) whose pension plan refused to include pre-1988 years of service in calculating their benefits under the plan. The *youngest* of this class of persons turned 60 sometime in 1988 and are currently at least 67 years old. No other persons will fit into this class in the future, and the number of persons is rapidly dwindling as a natural result of the death of these retirees.

The issue raised here is not one which has aroused any interest in legal circles. No other court of appeals has addressed the issue to date. Further, given the fact that the issue is not likely to recur because of its passing relevance and in light of the limited number of plans and participants to whom it may apply, it is unlikely that any federal court will ever have to confront the question again. In short, this is not the type of "important federal issue" to which this Court should turn its attention.

CONCLUSION

For all of the foregoing reasons, Respondents pray that the petition for writ of certiorari be denied.

Dated: December 22, 1995

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No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
vs.
PAUL L. SPINK, et al.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

I. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THE DECISIONS OF THE OTHER CIRCUITS 2

II. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG, INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986, AND WILL CREATE SIGNIFICANT LIABILITIES FOR EMPLOYERS THROUGHOUT THE NATION 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases — Page(s)

Akers v. Palmer.,
___ F.3d ___, 1995 U.S. App. Lexis 34607
(6th Cir. Dec. 11, 1995) 4

Amato v. Western Union Int'l, Inc.,
773 F.2d 1402 (2d Cir. 1985),
cert. dismissed, 474 U.S. 1113 (1986) 3

Johnson v. Georgia-Pacific Corp.,
19 F.3d 1184 (7th Cir. 1994) 4

Landgraf v. USI Film Products,
___ U.S. ___, 114 S. Ct. 1483,
128 L. Ed. 2d 229 (1994) 1, 7

Statutes

Internal Revenue Code

§ 411(b)(1)(H), 26 U.S.C. § 411(b)(1)(H) 8

Age Discrimination in Employment Act

§ 4(i)(1), 29 U.S.C. § 623(i)(1) 7

Employment Retirement Income Security Act

§ 204(b)(1)(H)(i),
29 U.S.C. § 1054(b)(1)(H)(i) 7
§ 406, 29 U.S.C. 1106 . . . . 1, 4, 5
§ 406(a)(1), 29 U.S.C. § 1106(a)(1) 4

Omnibus Budget Reconciliation Act of 1986

§ 9201 7

§ 9202(a)(2) 7
§ 9204(a)(1) 9
§ 9204(b) 9

Administrative Interpretations

IRS Notice 88-126, 1988-2 C.B. 538 (1988) 8,9

Legislative History

132 Cong. Rec. 32,975 (October 17, 1986) 9,10

PETITIONERS' REPLY BRIEF

In his Brief in Opposition, respondent argues that certiorari should be denied on both of the issues presented by the petition. On the first issue -- whether the Ninth Circuit erred by holding that Lockheed violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, by amending the terms of its pension plan while acting in its capacity as plan sponsor -- respondent argues that the Ninth Circuit's decision can somehow be reconciled with the abundant body of case law from other circuits which uniformly holds that a plan sponsor does not act in a fiduciary capacity when amending its plan. Respondent's argument ultimately relies upon circular reasoning, because there is no statutory or logical basis for holding that a plan sponsor can engage in a prohibited transaction which violates ERISA § 406 unless the act of amending the plan itself constitutes a breach of fiduciary duty. The Ninth Circuit's unprecedented holding that a plan sponsor can incur liability under ERISA deserves review, because it imposes fiduciary liability upon a plan sponsor which acts in a wholly non-fiduciary capacity.

On the second issue presented for review -- whether the new pension benefit accrual rules adopted by the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986") apply retroactively -- the principal argument raised by respondent is that this Court should overlook the Ninth Circuit's failure to properly interpret *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), simply because the Ninth Circuit cited *Landgraf* in its opinion and acknowledged that *Landgraf* is the controlling authority. Respondent's further argument that the Ninth Circuit correctly found the statute to apply retroactively is based upon an interpretation of statutory language which strains the

bounds of the English language, and also requires the Court to overlook the contrary administrative interpretation of the same statutory language by the Internal Revenue Service ("IRS"), the agency which concededly has authority for enforcing this provision of OBRA 1986.

Respondent also argues that neither issue is sufficiently important to deserve this Court's review, even if the Ninth Circuit did err in expanding the scope of fiduciary liability under ERISA or incorrectly impose OBRA 1986's pension benefit accrual rule retroactively. This is plainly wrong, because these issues are critical to every employer in the United States which sponsors a pension plan. This is demonstrated not just by the petition, but by the fact that five responsible organizations representing the interests of over 200,000 employers throughout the United States have requested leave to a file briefs as *amici curiae*, in support of the petition for certiorari. The issues presented in this case are far-reaching and of utmost significance to plan sponsors and the American business community, and deserve review by this Court.

I. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THE DECISIONS OF THE OTHER CIRCUITS.

The decision below is the only reported decision which holds that a pension plan sponsor violates ERISA when it amends its plan in a manner which satisfies ERISA's minimum participation, funding, and vesting requirements. The Ninth Circuit's opinion leaves no doubt that liability is based upon the act of amending a plan. "[W]e conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the

amendments provided for use of Plan assets to purchase a significant benefit for Lockheed." Pet. App. at 18a.

Respondent does not dispute that every other circuit to consider the issue has expressly declared that pension and welfare plan sponsors act in a settlor, rather than fiduciary, capacity when amending an ERISA plan.[1] Respondent nonetheless attempts to confuse this issue by relying upon the fact that Lockheed is a named fiduciary under the Plan, and that several of the individual defendants are also fiduciaries insofar as they act as Plan trustees and are required by ERISA to follow the terms of the Plan. All of this is beside the point, however, because a corporation which sponsors a plan wears "two hats" in dealing with the plan: a "corporate hat" when it creates or amends the plan to establish benefit levels and eligibility criteria, and a "fiduciary hat" when administering the plan or managing plan assets.[2] When amending a plan to create a new benefit and establish benefit eligibility requirements for it, as in the present case, the plan sponsor wears its "corporate hat" and is *not* acting as a fiduciary even if it is a named fiduciary of the plan.

---

[1] Respondent argues that some of the cases cited in the petition are distinguishable because they involved welfare plans, rather than pension plans. This is a distinction without a difference, because the principle that plan design is not a fiduciary function applies to both types of plans.

[2] *E.g.*, *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator). The same principle is reflected in the decisions of every circuit, other than the Ninth, to consider this issue. Petition at 9-11.

Respondent's argument attempts to avoid this basic principle through circular reasoning. This is done by first asserting that Lockheed's amendment to the Plan violated a "substantive provision of ERISA." Opposition at 11. But respondent never identifies which "substantive provision" of ERISA was violated and for good reason: Lockheed's Plan amendment did not deny anyone the right to continued participation in the Plan, nor did it diminish anyone's vested pension benefit, nor did it cause the Plan to become underfunded. Petition at 7 & n.2. There is simply no "substantive provision" identified by either respondent or the Ninth Circuit that Lockheed failed to satisfy when it amended the Plan, because nowhere does ERISA prohibit a release as a condition for eligibility for additional benefits.

The Ninth Circuit attempted to overcome this logical flaw by relying upon ERISA § 406, 29 U.S.C. § 1106, holding that when Lockheed amended the Plan to require a release as an eligibility requirement for additional benefits, it engaged in a prohibited transaction. The crucial point which both respondent and the Ninth Circuit fail to acknowledge, however, is that this makes no sense unless Lockheed acted as a *fiduciary* when it amended its Plan. This is because the prohibited transaction provisions of § 406 regulate *fiduciary* conduct, so there cannot logically be a prohibited transaction without a fiduciary breach.[3] The problem

[3] Section 406(a)(1) begins by stating that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction. . .", and goes on to specify the transactions which are prohibited. 29 U.S.C. § 1106(a)(1). The decisions of other circuits recognize that § 406 regulates fiduciary conduct. *See, e.g., Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994); *Akers v. Palmer*, ___ F.3d ___, 1995 U.S. App. Lexis (continued...)

with respondent's argument and the decision below, which is why American business is so alarmed (see briefs of *amici*), is that while it purports to sidestep the issue of whether Lockheed acted as a fiduciary when it amended the plan, it in fact held that it is exactly that conduct -- amending the plan in a sponsor capacity -- that triggers fiduciary liability. Because the Ninth Circuit held that amending the plan is fiduciary conduct,[4] there is a clear conflict with the other circuits. The Ninth Circuit's decision is a startling departure from settled law on an issue of extreme importance to plan sponsors and thus warrants this Court's intervention.

Respondent also fails to address several issues of significance which were raised in the petition. For example, respondent makes no mention of the Older Worker's Benefit Protection Act, which expressly contemplates the use of waivers in conjunction with early retirement programs. As Lockheed argued in the petition, it would be incredible for Congress to enact this legislation in 1990 if it had previously intended to outlaw altogether the use of waiver agreements in exchange for enhanced pensions through the prohibited transaction rule in ERISA § 406. Petition at 28. *Amici curiae* make the same point in their briefs. Brief of *Amici Curiae* ERISA Industry Committee, Association of Private Pension and Welfare Plans, and National Association of Manufacturers at 6-8; Brief of *Amicus Curiae* Equal Employment Advisory Council at 9-13.

[3] (...continued)
34607 (6th Cir. Dec. 11, 1995) ("The scope of ERISA's fiduciary duties is outlined in [29 U.S.C.] sections 1104 and 1106").

[4] The individual fiduciaries did nothing more than carry out and follow the terms of the Plan as amended.

Respondent also fails to acknowledge that the scope of the Ninth Circuit's decision will extend far beyond cases where the employer requires a release as a condition of receiving enhanced pension benefits as part of an early retirement window program. The Ninth Circuit did not limit its holding to release agreements: instead, it held that a plan sponsor violates ERISA whenever it receives a "significant benefit" through the amendment of an ERISA plan. Pet. App. at 18a. This covers a broad range of routine and common employer practices such as settling strikes, negotiating tradeoffs in labor contracts, attracting superior employees from competitors, or relieving pressure for higher wages. Petition at 26; Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 8-9. The decision below creates great uncertainly for plan sponsors throughout the nation anytime a pension plan is amended and the sponsor receives an ill-defined "significant benefit."

Unless reviewed and corrected by this Court, the decision below will surely have unwelcome consequences for plan sponsors and employees. It will no doubt lead to litigation, where ERISA plan sponsors are sued on the ground that the terms of a plan, or plan amendment, were designed to create or resulted in a "significant benefit" for the sponsor. It will also discourage employers from creating plans at all, or amending existing plans to add benefits, due to the certainty of litigation challenging benefit eligibility criteria or other plan design features under the much stricter fiduciary standards imposed by the decision below. The Court should therefore accept this case for review, in order to resolve the conflict between the circuits and to confirm that plan design decisions are not governed by fiduciary standards.

II. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG, INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986, AND WILL CREATE SIGNIFICANT LIABILITIES FOR EMPLOYERS THROUGHOUT THE NATION.

On the second issue presented by the petition, respondent acknowledges that this Court's decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), represents controlling authority. Respondent argues, however, that Congress expressly provided for retroactive application of OBRA 1986 and that therefore the "default" rule that statutes are to apply prospectively does not come into play.

Despite making this assertion, respondent fails to identify any statutory language in OBRA 1986 which expressly provides for retroactive application, a result which is not surprising because there is no such statutory language. Instead, respondent relies chiefly upon the Ninth Circuit's misreading of the statutory phrase which prohibits an age-based reduction of "the rate of an employee's benefit accrual," 29 U.S.C. § 623(i)(1); 29 U.S.C. § 1054(b)(1)(H)(i), by arguing that the word "rate" actually means "total benefits accrued" rather than the rate at which the benefit is accrued. Opposition at 24 n. 22.

Respondent's argument essentially asks the Court to overlook the Ninth Circuit's misreading of the plain language of Sections 9201 and 9202(a)(2) of OBRA 1986 and decline to review this issue because it is a "matter of minimal import." Opposition at 28. Besides being factually unsupported, this argument ignores the interest of the nation's preeminent employer organizations, which view this case as sufficiently significant to urge this Court to grant review. Indeed, one *amicus curiae* conservatively

calculates that the retroactive application of OBRA 1986 results in additional pension liabilities of $1.7 billion. Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 18-19. The Ninth Circuit's erroneous decision to impose retroactive application of OBRA 1986 is not only plainly wrong but will ultimately result in an extraordinary additional burden to employers throughout the United States which was wholly unintended by Congress.

Respondent also errs by denying that the Ninth Circuit's decision conflicts with the IRS interpretation of OBRA 1986. Opposition at 9. Respondent later contradicts this argument by conceding that the IRS's proposed regulation does not require that a plan retroactively credit an employee, such as respondent, for prior years of service if the employee was not a participant prior to the effective date of OBRA 1986.[5] Opposition at 27. Respondent's further argument that a subsequent administrative interpretation -- IRS Notice 88-126 -- supports his position is also incorrect. The two key sentences in this notice state:

> The final regulations to be issued by the IRS under section 411(b)(1)(H) of the Code *will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under noncontributory defined benefit plans*. Thus, the final regulations to be issued by the IRS will provide that the OBRA 1986 benefit accrual rules apply to all years of service (including years of service

[5] This concession is long overdue. Respondent previously argued in both the district court and the Ninth Circuit that the Proposed Regulation supports his position. Pet. App. at 13a n. 3.

> before January 1, 1988) completed by a *participant* in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988.

IRS Notice 88-126, 1988-2 C.B. 538 (1988) (emphasis added). Since respondent has now conceded that the Proposed Regulation is adverse to its position, it is not surprising that the first sentence quoted above has been conveniently *omitted* from respondent's discussion. The second sentence (which is quoted in the Opposition) does nothing to change the analysis -- it only notes that years of service completed by a *participant* in years before 1988 must be counted. Respondent was not, however, a participant before 1988, so this does not apply to him.

Finally, respondent is again less than candid with the Court in discussing the differences in effective date language between § 9204(a)(1) and § 9204(b) of OBRA 1986. In response to petitioner's argument that the difference in language only reflected Congress's desire to not affect the results of pending litigation concerning the Post-NRA Accrual Cessation Rule, respondent asserts that "nothing, however, in the statute or legislative history . . . supports this speculation about congressional motives." Opposition at 26 n. 26. This is contradicted not only by a statement in the Conference Report, Petition at 23 n. 14, but also by the statement of Representative Clay, the chair of the House Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, that Congress did not intend any inference to be drawn as to "whether and to what extent additional accruals and allocations might be required under current law," 132 Cong. Rec. 32,975 (October 17, 1986), since that was the issue of the then pending litigation. Instead, Representative

Clay confirmed that the purpose of OBRA 1986 was to provide employers with "prospective guidance" on the question of pension accruals. *Id.* This legislative history therefore confirms that OBRA 1986 applies prospectively. Review by this Court is required to correct the Ninth Circuit's erroneous imposition of such an enormous retroactive liability on the American business community.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition and the briefs of *amici curiae*, petitioners urge the Court to grant certiorari in this case.

DATED: January 2, 1996.

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No. 95-809

IN THE
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OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE, THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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IN THE
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OCTOBER TERM, 1995

No. 95-809

LOCKHEED CORPORATION, et al.
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MOTION FOR LEAVE TO FILE BRIEF OF THE ERISA INDUSTRY COMMITTEE, THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC"), the Association of Private Pension and Welfare Plans ("APPWP"), and the National Association of Manufacturers (the "NAM") hereby move, pursuant to Rule 37.4, for leave to file the attached brief *amici curiae* in support of the Petition

for Writ of Certiorari. The attached brief addresses solely the court of appeals' ruling that Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims. While Petitioners have consented to the filing of the attached brief, Respondent has declined to consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

ERIC is a non-profit organization representing over 120 major employers, virtually all of whom maintain defined benefit pension plans governed by ERISA and who therefore could be affected adversely by the court of appeals' decision. APPWP is a non-profit association whose members include both small and large employers (including many *Fortune* 500 companies), as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers, and other professional benefit organizations. The NAM is the nation's oldest and largest broad-based industrial trade association; its nearly 13,500 member companies and their subsidiaries employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods.

ERIC and APPWP frequently participate as *amici curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] The NAM often

[1] *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *Patterson* v. *Shumate*, 504 U.S. 753 (1992); *Public Employees Retirement Sys. of Ohio* v. *Betts*, 492 U.S.

(continued...)

participates as *amicus curiae* in cases raising issues of importance to the business community.[2]

Because the court of appeals' decision casts doubt on the lawfulness of many traditional benefit plan provisions and practices, the *amici* have a profound interest in the resolution of this case. In addition, the court of appeals' decision creates uncertainty throughout the country regarding the enforceability of the many thousands of releases that have been executed in recent years by retiring employees in exchange for enhanced early retirement benefits under their employers' retirement plans. The court of appeals' decision also will have a major impact on the design of early retirement incentive programs that employers wish to offer their employees in the future. Moreover, the court of appeals' decision creates uncertainty about the lawfulness of many other commonplace employee benefit arrangements entered into by employers and employees throughout the country.

ERIC, APPWP, and the NAM believe that as *amici curiae* they can present to the Court the perspective of the many thousands of employers that have sponsored early retirement incentive programs and other employee benefit plans potentially affected by the court of appeals' decision and

[1](...continued)
158 (1989); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *International Bd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

[2] *See, e.g., National Posters, Inc.* v. *NLRB*, 494 U.S. 1026 (1990).

thereby help the Court to understand the far-reaching significance of this case to countless employers and employees throughout the country.

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December 22, 1995

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Decision Below Creates Uncertainty About the Enforceability of the Many Thousands of Releases That Have Been Executed in Exchange for Early Retirement Incentive Benefits, a Practice That Has Been Approved by Congress, the Treasury Department, and the Courts.	3
A. Early Retirement Incentive Programs Serve Important Social And Economic Purposes. .	3
B. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread.	5
C. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases.	6

D. Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases. 8

E. Courts In Other Circuits Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Pension Benefits. 9

II. The Decision Below Has a Chilling Effect on Employers That Wish To Offer Early Retirement Incentives To Their Employees. 10

III. Because the Advantages That Lockheed Derived From the Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, the Decision Below Creates Uncertainty About the Lawfulness of Many Other Widespread Employment Practices. 12

IV. The Decision Below Is Inconsistent With Both the Language and the Purposes of ERISA's Prohibited Transaction Provisions. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page**

Akers v. Palmer, No. 94-5740, 1995 U.S. App. LEXIS 34607 (6th Cir. Dec. 11, 1995) 16

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 13

Amato v. Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) 17

Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993) 9, 10

Cirillo v. ARCO Chemical Co., 862 F.2d 448 (3d Cir. 1988) 9

Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) 4

Commissioner v. Keystone Consolidated Industries, Inc., 113 S. Ct. 2006 (1993) 19

District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468 (S.D.N.Y. 1983) 19

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 13

Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) 4

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 14

Johnson v. Georgia-Pacific Corp., 19 F.3d 1184 (7th Cir. 1994) 17

Milwaukee Area Joint Apprenticeship Training Comm. v. Howell, 67 F.3d 1333 (7th Cir. 1995) 17, 19

Page

Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) 14, 17

Statutes and Regulations

Age Discrimination in Employment Act of 1967 ("ADEA")
29 U.S.C. §§ 621, *et seq.* 7
29 U.S.C. § 623(f)(2) 7
29 U.S.C. § 623(*l*)(1) 7
29 U.S.C. § 623(*l*)(2) 15
29 U.S.C. § 626(f)(1) 7

Davis-Bacon Act
40 U.S.C. § 267a(b) 13

Employee Retirement Income Security Act of 1974 ("ERISA")
29 U.S.C. § 1101(a) 15, 18
29 U.S.C. § 1002(21)(A) 18
29 U.S.C. § 1106 . . . . 1, 12
29 U.S.C. §§ 1106-08 9

Internal Revenue Code of 1986
Int. Rev. Code § 419A 15
Int. Rev. Code § 501(c)(9) 15
Int. Rev. Code § 4975 9

Page

The Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 6

29 C.F.R. § 5.31 (1995) 13
Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) 8
Treas. Reg. § 1.401(k)-1(a)(3)(iv) 14
Treas. Reg. § 1.411(a)-4(c) 8
Temp. Treas. Reg. § 1.411(a)-4T(c), *Example (1)* . . . 8
Treas. Reg. § 1.501(c)(9)-3 15

Legislative History

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H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973) . . 13, 19
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-809

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE, THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC"), the Association of Private Pension and Welfare Plans ("APPWP"), and the National Association of Manufacturers (the "NAM") submit this brief *amici curiae* in support of the Petition for Writ of Certiorari. This brief addresses solely the court of appeals' ruling that Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income

Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims.

INTEREST OF *AMICI CURIAE*

The interest of ERIC, APPWP, and the NAM is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

The Court should review and reverse the court of appeals' decision.

The court of appeals' decision creates uncertainty about the enforceability of the many thousands of releases that have been executed in exchange for early retirement incentive benefits, a practice that has been approved by Congress, the Treasury Department, and the courts. In addition, unless it is reviewed and reversed, the court of appeals' decision will have a chilling effect on employers that wish to offer early retirement incentive benefits to their employees in the future.

Moreover, because the advantages that Lockheed derived from the releases in this case are not distinguishable from many other advantages that employers routinely receive from the employee benefit plans that they sponsor, the decision below creates uncertainty about the lawfulness of many other conventional employment practices. As a result, unless it is reviewed and reversed, the court of appeals' decision will cast doubt on the lawfulness of a wide array of commonplace employee benefit arrangements entered into by employers and employees throughout the country.

Finally, the Court should review and reverse the court of appeals' decision because the decision is inconsistent with the

language and the purposes of ERISA's prohibited transaction provisions and with the decisions of other appellate courts.

ARGUMENT

I. The Decision Below Creates Uncertainty About the Enforceability of the Many Thousands of Releases That Have Been Executed in Exchange for Early Retirement Incentive Benefits, a Practice That Has Been Approved by Congress, the Treasury Department, and the Courts.

A. Early Retirement Incentive Programs Serve Important Social And Economic Purposes.

During the 1980's and 1990's, international competitive pressures, technological changes, and down-turns in economic activity have forced many large U.S. employers to make substantial reductions in their workforces. Downsizing is not limited to employers whose overall business is temporarily or permanently contracting, however. Even an employer whose overall business and workforce are growing might need to reduce the size of its workforce in particular divisions or job categories in response to competitive pressures, changing markets, or technological change.

Faced with the need to downsize some or all of its workforce, an employer has two general choices: it can downsize through voluntary measures, such as early retirement window programs, or through involuntary measures, such as layoffs. Employers and employees generally prefer a voluntary program to the drastic approach of laying off large numbers of employees.

An involuntary program could well lead to the layoff of many employees who wish to continue working, yet leave in

place other employees who are on the verge of leaving anyway, either for retirement or alternative employment. By contrast, a voluntary program allows eligible employees to decide for themselves whether they wish to continue working for the company or to leave the company with enhanced benefits. Moreover, in many cases a voluntary program permits an employee to retire early with benefits that are comparable to or better than the benefits the employee would receive if he or she continued to work and retired several years later. Voluntary programs thus provide opportunities and benefits that generally are not available under involuntary programs.

Offering employees an incentive to retire voluntarily during a designated period of time (often referred to as an "early retirement window") can reduce and sometimes eliminate the need for involuntary reductions-in-force and create opportunities for younger employees.[1] The use of early retirement incentives "is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees . . . ." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).[2]

[1] HEWITT ASSOCIATES, PLAN DESIGN AND EXPERIENCE IN EARLY RETIREMENT WINDOWS AND IN OTHER VOLUNTARY SEPARATION PLANS 5 (1986).

[2] "Provided the employee may decline the offer and keep working under lawful conditions, the offer [of enhanced early retirement benefits] makes him better off. He has an additional option, one that may be . . . worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure." *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987). *See also* S. Rep. No. 263, 101st Cong., 2d Sess. 52 (1990) ("Early retirement incentive plans are extremely popular with older (continued...)

B. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread.

The use of releases in connection with early retirement incentive programs is widespread. "About 80 percent of *Fortune* 100 companies sponsored an exit incentive program at least once during 1979 through 1988 . . . about 55 percent of a sample of large companies (25,000 or more employees) offered such programs at least once between 1981 and 1985." U.S. GENERAL ACCOUNTING OFFICE, AGE DISCRIMINATION: USE OF WAIVERS BY LARGE COMPANIES OFFERING EXIT INCENTIVES TO EMPLOYEES 2 (Apr. 1989) (footnote omitted) ("1989 GAO Report"). In fact, for some employers, early retirement incentives are a routine way to thin the ranks of their employees. The 1989 GAO Report's survey of *Fortune* 100 companies found that of the 80 percent that sponsored an exit incentive program at least once between 1979 and 1988, about 61 percent did so in more than one year. *Id.* at 4.[3]

The use of early retirement incentive plans has not abated since the 1989 GAO Report. A 1994 survey report by The Wyatt Company found that of the 388 companies with defined benefit pension plans that responded to the survey, 27 percent had offered at least one early retirement incentive plan

[2](...continued)
workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . . .").

[3] In 1992, the Internal Revenue Service, in response to requests from major employers, ruled that, in appropriate circumstances, an employer may make repeated offerings of early retirement incentive benefits without causing those benefits to become a permanent feature of the employer's pension plan. *See* Rev. Rul. 92-66, 1992-1 C.B. 92.

between 1991 and 1993 and that, of the companies offering early retirement incentive plans, 20 percent offered more than one plan during the 1991-1993 period. THE WYATT COMPANY, SURVEY REPORT: DESIGNING AN EFFECTIVE EARLY RETIREMENT WINDOW 2 (1994).[4]

Many employers offering early retirement incentive plans require eligible employees to waive employment-related claims as a condition of receiving enhanced retirement benefits. The 1989 GAO Report found that about 30 percent of the *Fortune* 100 companies that sponsored an exit incentive program required employees to sign a waiver in order to receive enhanced benefits. 1989 GAO Report 2. Another study found that about 25 percent of the companies with early retirement incentive programs required releases as a condition of receiving enhanced benefits. Grant, *The "Open Window" — Special Early Retirement Plans in Transition*, 16 EMPLOYEE BENEFITS JOURNAL 10, 15 (1991).

C. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases.

Congress has explicitly approved the practice of offering exit incentive benefits to employees who execute releases. The Older Workers Benefit Protection Act of 1990, Pub. L.

[4] "The number of companies [participating in the survey] offering windows rose steadily from 22 (roughly 4% of all respondents) in 1989 to 59 (slightly more than 11%) in 1992." TOWERS, PERRIN, FORSTER & CROSBY, INC., MONITOR (SEPT. 1922). *See also* HEWITT ASSOCIATES, EARLY RETIREMENT WINDOWS, LUMP SUM OPTIONS, AND POSTRETIREMENT INCREASES IN PENSION PLANS 1 (1992) ("Hardly a week passes without mention in the popular press of another company offering an early retirement window program.").

No. 101-433, 104 Stat. 978 ("OWBPA"), provides explicitly that it is not a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, for the employer to observe the terms of a "voluntary early retirement incentive plan" if the plan is "consistent with the relevant purpose or purposes of this Act." OWBPA, § 103, amending 29 U.S.C. § 623(f)(2). In addition, the OWBPA expressly recognizes that a release or waiver may be given "in connection with an exit incentive or other employment termination program offered to a group or class of employees," and specifies the standards that a waiver must meet in these circumstances in order to be enforceable. *See* OWBPA § 201, amending 29 U.S.C. § 626(f)(1).[5]

The OWBPA thus shows that Congress intended to permit employers to require a waiver of ADEA claims as a condition of receiving early retirement benefits, and neither the OWBPA nor its legislative history contains the slightest suggestion that a waiver under an early retirement incentive plan violates ERISA. This certainly was not because Congress had forgotten about ERISA; the OWBPA provisions governing early retirement benefits refer specifically to ERISA. *See* OWBPA § 103, amending 29 U.S.C. § 623(*l*)(1).

It is implausible that when it enacted the OWBPA, and allowed employers to require a waiver of ADEA claims as a condition of receiving enhanced early retirement benefits,

[5] "S. 1511 permits early retirement incentive plans that are both truly voluntary and consistent with the relevant purpose or purposes of the ADEA. . . . In addition, if a waiver is requested from a group of employees as part of an exit incentive program, the following additional procedural requirements must be met: the employer must provide specific information about the eligibility factors for inclusion of individuals in the program and the age profiles of individuals who are included in and excluded from the program." 136 Cong. Rec. H8618-19 (daily ed. Oct. 2, 1990) (Explanation of S. 1511).

Congress was approving a practice that was prohibited by ERISA.[6]

D. Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases.

Treasury Department regulations recognize that pension plans may condition the receipt of benefits on covenants not to compete and on waivers as long as the Internal Revenue Code's nondiscrimination standards are met and the provision does not cause an employee to lose vested benefits.[7] Although the Treasury Department's views are entitled to deference here, the court of appeals' discussion of the release issue does not even refer to the Treasury Department's regulations.[8]

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[6] *See also infra* p. 13 (pension benefits may be used to offset employer's obligation under Davis-Bacon Act).

[7] *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan). In addition, the Internal Revenue Service has ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* Tech. Adv. Mem. 9516005 (Dec. 22, 1994).

[8] ERISA's prohibited transaction provisions appear in both Title I and Title II of ERISA. The Department of Labor is principally responsible for the administration of the Title I provisions, while the Treasury Department is principally responsible for the administration of the Title II provisions. The standards of conduct established by the two

(continued...)

The Treasury's regulations would be meaningless if ERISA prohibited an employer from amending a plan to impose a waiver requirement. It is implausible, to say the least, that this expert federal agency, which is responsible for the administration of the ERISA provisions that appear in the Internal Revenue Code, would have issued regulations that explicitly sanction a practice that ERISA forbids.

E. Courts In Other Circuits Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Pension Benefits.

The court of appeals' opinion fails to recognize that other courts have upheld the validity of releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[9] These cases contain not the slightest suggestion that the releases violated ERISA.

The decisions in these cases would be pointless if the releases violated ERISA.[10] The panel's decision is thus

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[8](...continued)

sets of prohibited transaction provisions are nearly identical. *Compare* ERISA §§ 406-08, 29 U.S.C. §§ 1106-08, *with* Int. Rev. Code § 4975. *See generally* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 306-323 (1974) (explaining the operation of the Title I and Title II provisions); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (recognizing overlap of Labor and Treasury responsibilities).

[9] *See, e.g., Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

[10] The fact that ERISA regulates employee benefit plans is hardly an obscure or subtle point. The plaintiffs in *Astor*, *supra*, sued under

(continued...)

incompatible with a sound body of law upholding the enforceability of releases given in exchange for additional benefits under ERISA-governed plans.

Settlements of and judgments in age discrimination lawsuits, including suits filed by the EEOC, frequently require defendant employers to amend their pension plans to provide enhanced benefits in exchange for the plaintiffs dropping their claims for monetary damages or agreeing to accept reduced payments directly from the defendant employer.[11] Here too, under the rationale of the court of appeals, these are prohibited transactions akin to an employer's writing checks on a pension fund in order to settle lawsuits. There is no evidence to suggest that ERISA was intended to bar these judgments and settlements.

II. The Decision Below Has a Chilling Effect on Employers That Wish To Offer Early Retirement Incentives To Their Employees.

Unless it is reviewed and reversed, the court of appeals' decision will deter employers throughout the country from offering early retirement incentive benefits to employees. Because early retirement incentive programs are commonly used to effect workforce reductions and serve important social

[10](...continued)
and the court emphasized that the plan was governed by ERISA. 7 F.3d at 534, 536-37.

[11] *See, e.g.*, 150 BNA Daily Labor Reporter at A-3 (Aug. 4, 1995) (consent decree in *EEOC v. McDonnell Douglas Corp.*, No. 4:93-CV-526 (E.D. Mo)); *see also* Priv. Ltr. Rul. 8536064 (June 12, 1985) (additional pension benefits provided as part of settlement of class action challenging termination of health benefits).

purposes, the widespread chilling effect of the court of appeals' decision warrants the grant of certiorari in this case.

As long as the court of appeals' decision remains in effect, an employer offering enhanced retirement benefits to employees who agree to waive employment-related claims will be exposed to the risk of litigation brought by current or former employees who claim that the employer has engaged in a prohibited transaction under ERISA and/or that the waivers are void.

Although an employer might wish to reduce its workforce through a voluntary incentive program rather than through involuntary layoffs, a rational employer will choose to provide enhanced retirement benefits under a voluntary program only if the value it derives from providing those benefits exceeds the cost of providing them. Waivers of employment-related claims reduce the employer's exposure to claims by retired employees, including the litigation expenses for which the employer must budget. In the past, many employers concluded that they could derive substantial value from an offer of enhanced early retirement incentive benefits to those employees who agreed to waive employment-related claims and that this value justified the cost of providing the enhanced benefits.

But if an employer cannot limit early retirement incentive benefits to those employees who agree to sign waivers, some employers will decide to make workforce reductions by relying instead solely on involuntary workforce reduction programs. If employers cannot enforce the waivers they obtain in exchange for early retirement incentive benefits, and remain exposed to employment-related litigation, employers can be expected to choose not to incur the cost of offering early retirement incentive benefits, to achieve their workforce reduction objectives through involuntary layoffs, and to apply the resulting cost savings to their litigation budgets. Others

will scale down any enhanced benefits that they offer under a voluntary program, in recognition of their continued exposure to employment-related claims by former employees. Thus, both employers and employees will be harmed unless the Court reviews and reverses the court of appeals' decision.

III. Because the Advantages That Lockheed Derived From the Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, the Decision Below Creates Uncertainty About the Lawfulness of Many Other Widespread Employment Practices.

The court of appeals held that because Lockheed derived "significant" benefits from the releases that the plan required of those electing enhanced retirement benefits, Lockheed violated section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if he or she knows or should know that the transaction "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." In so holding, the court of appeals failed to recognize that the advantages Lockheed derived from its early retirement program are no different from many advantages that employers routinely derive from their employee benefit plans. The availability of such advantages is a principal reason employers establish such

plans,[12] and there is no reason to believe that Congress intended such advantages to violate ERISA.

For example, employers negotiating with trade unions frequently reach agreements in which the *quid pro quo* for enhanced retirement benefits is lesser wage increases, outright wage reductions, or other changes in the conditions of employment that benefit the employer. Although such agreements obviously benefit the employer (for example, by reducing wage costs), no court or government agency has ever suggested, or reasonably could suggest, that a negotiated exchange of enhanced retirement benefits for reduced wage costs violates ERISA.

Similarly, a government contractor may offset its prevailing wage obligation under the Davis-Bacon Act with any pension benefits it provides to its employees under an ERISA-governed plan.[13] This use of pension assets provides a benefit to the contractor that is every bit as substantial and direct as the benefits Lockheed received from the releases in this case. The court of appeals' decision simply cannot be reconciled with the congressionally approved practice of using pension benefits to offset a contractor's prevailing wage obligation under the Davis-Bacon Act.

Some employers allow employees to participate in a pension plan only if they agree in exchange to reduce their

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[12] ERISA neither requires an employer to adopt an employee benefit plan nor dictates the level of benefits that a plan must provide. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12 (1981); H.R. Rep. No. 533, 93d Cong., 1st Sess. 2 (1973).

[13] *See* 40 U.S.C. § 267a(b); 29 C.F.R. § 5.31 (1995); U.S. TREAS. DEP'T, STUDY OF THE EFFECT OF THE MINIMUM PARTICIPATION REQUIREMENTS ON GOVERNMENT CONTRACTORS 2-6 (March 1991).

cash compensation. By striking such a bargain, the employer reduces its wage costs, and employees obtain retirement benefits. It has never been suggested that such arrangements are unlawful and, indeed, they are expressly recognized by Treasury Department regulations. *See* Treas. Reg. § 1.401(k)-1(a)(3)(iv) (excluding from the definition of a "cash or deferred election" a one-time irrevocable election to receive contributions or benefit accruals under a pension plan); *see also* IRS Announcement 94-101, § 441.1, 1994-35 I.R.B. 53.

Even where there is no explicit increase in pension benefits in exchange for a reduction in pay, such trade-offs are often made implicitly. Employers attract and retain employees on the basis of their total offerings of compensation and benefits. For example, an employer might find it cost-effective to offer employees above-average retirement benefits together with below-average current compensation. In these circumstances, the employer derives a monetary benefit from its retirement plan that is no less significant or direct than the benefits Lockheed derived from the releases in this case.[14]

Likewise employers that offer early retirement incentive plans without seeking releases from their employees benefit from the resulting reductions in wage and benefit costs. Such benefits have never been found to violate ERISA even though they are plainly designed to serve the employer's business needs by reducing employee headcount.[15]

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[14] *See generally* RONALD G. EHRENBERG AND ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 394-406 (3d ed. 1988); ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 3 (1982).

[15] *See, e.g., Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283-84 (3d Cir. 1988); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 808-09 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Similarly, some (continued...)

Some exit incentive programs offer severance benefits and retiree health benefits through a trust similar to a pension trust.[16] Because severance and retiree health plans are governed by ERISA's fiduciary responsibility provisions,[17] the court of appeals' decision applies to exit incentive plans that offer severance and retiree health benefits. According to the court of appeals' decision, an employer engages in a prohibited transaction if it uses a trust fund to provide severance or retiree medical benefits to employees who agree to terminate employment and execute a release.

In sum, the benefits Lockheed derived from its plan amendment do not differ in degree or in kind from the benefits enjoyed by employers under many commonplace arrangements. If the court of appeals' decision is correct, ERISA has, for over 20 years and unbeknownst to Congress, employers, unions, and government agencies, outlawed countless traditional employment arrangements that employers, unions, and employees rely on every day. There is no reason

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[15](...continued)
employers offer early retirement incentive benefits only to employees who agree to work until a specified future retirement date. These employers directly benefit both from the additional services rendered by the participating employees and from the reduction in payroll costs incident to the employees' retirement.

[16] *See* 29 U.S.C. § 623(*l*)(2) (recognizing that exit incentive programs provide retiree health and severance benefits); Int. Rev. Code § 501(c)(9) (tax exemption for a voluntary employees' beneficiary association [a "VEBA"]; Treas. Reg. § 1.501(c)(9)-3(c), (d), (e) (permitting a VEBA to provide severance benefits and health benefits); *see also* Int. Rev. Code § 419A(c)(2), (3) (reserves for severance and retiree health benefits).

[17] *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

to believe that this is what Congress intended when it enacted ERISA.

IV. The Decision Below Is Inconsistent With Both the Language and the Purposes of ERISA's Prohibited Transaction Provisions.

The court of appeals' opinion overlooks two critical points: first, section 406(a)(1)(D) prohibits only transactions involving plan *fiduciaries*, and second, ERISA's legislative history shows that the prohibited transaction provisions were never intended to apply to the payment of benefits pursuant to duly adopted plan amendments.

Section 406(a)(1) provides that "a fiduciary" shall not cause a plan to engage in certain prohibited transactions. Thus, section 406(a)(1) applies only if "a fiduciary" causes the transaction in question to occur. If Lockheed did not act as a fiduciary when it amended its pension plan, it could not have violated section 406(a)(1).

In fact, the court of appeals did not find, and could not have found, that Lockheed acted as a fiduciary when it amended the plan, in light of the well established rule that an employer does not act as a fiduciary when it acts to establish, amend, or terminate a plan. All of the courts of appeals that have considered the matter have distinguished between plan administration, to which ERISA's fiduciary duties apply, and plan design, which is reserved to the employer in its capacity as settlor and is not subject to the fiduciary duties that apply to plan administration.[18]

[18] *See, e.g.*, *Akers v. Palmer*, No. 94-5740, 1995 U.S. App. LEXIS 34607, at *9 (6th Cir. Dec. 11, 1995) ("a company is only subject to fiduciary restrictions when managing a plan according to its (continued...)

For example, in *Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333 (7th Cir. 1995), the Seventh Circuit considered the lawfulness of a scholarship loan agreement under which an ERISA-governed apprenticeship training fund made a loan to an apprentice. The apprentice was free to leave the electrical industry with no obligation to repay the loan. But if the apprentice accepted employment within the electrical industry, his only options were (1) to repay the loan in kind by working for an employer that contributed to the plan or (2) to default under the loan by working for a non-contributing employer and to repay the loan in cash.

After the district court held that the apprentice was not required to repay his loan on the ground that the loan program violated ERISA (apparently on the theory that the loan terms impermissibly benefited contributing employers), the Seventh Circuit reversed on the ground that the district court had

> failed to recognize the distinction between the scope of fiduciary duties owed during plan administration and the lack of fiduciary duties owed during plan design or amendment.
>
> . . . As this Circuit has previously noted, it would contravene Congress's intent for this Court to

[18](...continued)
terms, but not when it decides what those terms are to be"); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (when amending a plan, an employer does not act as a fiduciary); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer-administrator "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator, not when, *e.g.*, amending a plan); *Trenton*, *supra*, 832 F.2d at 808-09 (design of early retirement plan "was purely a corporate management decision").

> dictate the content of a welfare benefit plan. As such, this Circuit has held that "an employer unilaterally may change or abolish [a welfare benefit plan] without violating ERISA."

67 F.3d at 1338 (citations omitted).[19]

This well accepted view is compelled by ERISA's definition of a "fiduciary," which provides, in general, that a person is a fiduciary of a plan only "to the extent" that he or she has control or authority over "management" or "administration" of the plan or "management or disposition of its assets." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Because Lockheed was not engaged in the management or administration of the plan or its assets when it amended the plan, it was not acting as a fiduciary and could not possibly have violated section 406(a)(1)(D).

The court of appeals argued that because section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," 60 F.3d at 623, so too section 406(a)(1)(D) must prohibit plan amendments that result in plan funds being used to buy releases. This facile argument is not only inconsistent with a literal reading of section 406(a)(1)(D) (which on its face applies only to fiduciaries), but also ignores the fact that Lockheed, like other employers, is free under ERISA to terminate its pension plan and thereafter to use the plan's surplus for any purpose the employer deems appropriate,

[19] A scholarship plan is classified as a welfare plan under ERISA. ERISA's fiduciary duty provisions apply to both welfare plans and pension plans. *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

including the purchase of releases.[20] The termination of a pension plan and recovery of the plan's surplus assets by the employer are permissible under ERISA for the same reason that Lockheed's plan amendment is permissible: they involve questions of plan design, which are simply not governed by ERISA's fiduciary duties.

The prohibited transaction provisions of Title I were designed to protect a plan from being damaged by abuses by fiduciaries in the management of plan assets, not to influence plan design or to curb the distribution of plan benefits.[21] There is no basis in the text, purpose, or legislative history of the statute for concluding that Lockheed's amendment of its plan to provide enhanced retirement benefits violated section 406(a)(1)(D).

[20] *See, e.g., District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to Hon. Edward R. Roybal, Chairman, House Select Committee on Aging, *reprinted in* 13 BNA Pension Reporter 2080, 2081 (Nov. 18, 1986); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to John N. Erlenborn, Chairman, Advisory Council on Employee Welfare & Pension Benefit Plans, *reprinted in* 13 BNA Pension Reporter 472 (Mar. 13, 1986).

[21] *See Commissioner v. Keystone Consol. Indus.*, 113 S.Ct. 2006, 2012 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."); *Milwaukee Area Joint Apprenticeship Training Comm., supra*, 67 F.3d at 1338 (Congress did not intend ERISA's fiduciary responsibility provisions to dictate the terms of a plan); H.R. Rep. No. 1280, *supra*, at 306 ("Under the labor provisions (title I), *the fiduciary is the main focus of the prohibited transaction rules*.") (emphasis added); S. Rep. No. 383, 93d Cong., 1st Sess. 99 (1973) ("To prevent discrimination against fiduciaries and parties in interest, the bill permits these persons to receive any benefits to which they are entitled as participants or beneficiaries in the plan."); H.R. Rep. No. 533, *supra*, 7, 11-13, 21 (1973) (fiduciary responsibility provisions are concerned with plan administration and operation).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant certiorari in this case.

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December 22, 1995

(4)

No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Lockheed Corporation *et al.*, Petitioners, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondent, Theresa M. Traber, after being asked, refused consent. Because all parties

have not consented, a motion to file this brief is required.

In support of this motion, EEAC, by the following, shows that its brief brings relevant matters to the attention of this Court that have not been presented by the parties.

1. EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its association members, are employers subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* As employers, virtually all of EEAC's members maintain employee benefit plans and offer early retirement incentive programs. These plans are either adopted at the employer's option or are products of collective bargaining with employee representatives.

3. As potential defendants to lawsuits under ERISA and the ADEA, EEAC's members are interested in the issues presented in this case; i.e., whether the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, §§ 9201-9204, 100 Stat. 1874, 1973-1980 (1986) (OBRA), has retroactive application and whether an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program.

4. The issues presented in the petition are extremely important to EEAC's constituency. The Ninth Circuit held that the OBRA amendments apply retroactively. Thus, the court ruled that the OBRA amendments require employers not only to permit employees hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively include pre-enactment service years in calculating accrued benefits. The Ninth Circuit also held that Lockheed violated ERISA by requiring a release of claims as a precondition to participation in an enhanced benefits early retirement program. If either of these rulings are allowed to stand, there will be a substantial adverse impact upon employers who maintain employee benefit plans and upon employees who routinely receive enhanced benefit packages in exchange for releasing their employers from potential litigation claims.

5. The Ninth Circuit's decision that the OBRA amendments have retroactive application is not authorized by the language of the amendments, is in direct conflict with this Court's recent decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), and contravenes the legislative history of the amendments. Moreover, if allowed to stand, the Ninth Circuit's decision will hamper the ability of employers to offer early retirement incentives.

6. Because of its interest in the application of the nation's civil rights laws, EEAC has filed briefs

as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in numerous cases before the Courts of Appeals involving ERISA.[1] Furthermore, a number of other cases in which EEAC has participated have involved ADEA.[2] In addition, EEAC has briefed a number of other employment issues in this Court.[3]

7. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and potential beneficiaries of early retirement benefit plans.

8. EEAC's brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council, respectfully requests that the Court grant it leave to file a brief as *amicus curiae* in this case in support of Petitioners.

Respectfully submitted,

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[1] *Philadelphia Electric Co. v. Fischer, cert. denied,* 114 S. Ct. 622 (1993); *Ingersoll-Rand Co. v. McClendon,* 111 S. Ct. 478 (1990); *General Motors Corp. v. Wells,* 881 F.2d 166 (5th Cir. 1989), *cert. denied,* 110 S. Ct. 1959 (1990); *Shaw v. Delta Airlines,* 463 U.S. 85 (1983); *Nolan v. Otis Elevator Co.,* 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. and American Airlines v. N.Y. Human Rights Appeal Board,* 359 N.E.2d 393 (N.Y. 1976).

[2] *Public Employees Retirement Sys. of Ohio v. Betts,* 109 S. Ct. 2854 (1989); *EEOC v. Westinghouse Electric Corp.,* 869 F.2d 696 (3d Cir.), *vacated and remanded,* 110 S. Ct. 37 (1989), *on remand,* 907 F.2d 1354 (3d Cir. 1990); *Raczak v. Ameritech,* No. 95-1082 (6th Cir. Apr. 1995); *EEOC v. Westinghouse Electric Corp.,* 725 F.2d 1354 (3d Cir. 1983), *cert. denied,* 469 U.S. 820 (1984); *EEOC v. Borden's, Inc.,* 724 F.2d 1390 (9th Cir. 1984); *O'Shea v. Commercial Credit Corp.,* 930 F.2d 358 (4th Cir.), *cert. denied,* 112 S. Ct. 177 (1991); *Forbus v. Sears, Roebuck & Co.,* 958 F.2d 1036 (11th Cir.), *cert. denied,* 113 S. Ct. 412 (1992).

[3] *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977); *Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993); and *Harris v. Forklift Sys., Inc.,* 114 S. Ct. 367 (1993).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR GRANTING THE WRIT 4

REASONS FOR GRANTING THE WRIT 5

I. THE DECISION REACHED BY THE NINTH CIRCUIT, THAT THE OBRA AMENDMENTS APPLY RETROACTIVELY, IS NOT AUTHORIZED BY THE LANGUAGE OF THE AMENDMENTS, IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *LANDGRAF v. USI FILM PRODUCTS*, AND CONTRAVENES THE LEGISLATIVE HISTORY OF THE AMENDMENTS 5

A. OBRA Amended ADEA and ERISA to Require Pension Accrual for Employees Working Beyond Normal Retirement Age Only for Plan Years Beginning On or After January 1, 1988 5

B. The Legislative History of the OBRA Amendments Makes Clear that the Legislation Does Not Apply to Years Prior to 1988 6

C. Retroactive Application of the OBRA Amendments Would Be Manifestly Unjust 7

II. IF AFFIRMED, THE NINTH CIRCUIT'S DECISION WILL HAMPER THE USE OF EARLY RETIREMENT INCENTIVE PROGRAMS AND RELEASES CONTRARY TO THE INTENT OF CONGRESS 9

TABLE OF CONTENTS—Continued

Page

A. The Older Workers Benefit Protection Act Expressly Recognizes that an Employer May Obtain a Release or Waiver in Connection with an Exit Incentive or Other Employment Termination Program 9

B. Employers May Cease to Offer Enhanced Benefits to Employees at All if They Are Denied the Ability to Obtain Releases 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES Page

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 7, 8, 9

Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989) 10

Florida v. Long, 487 U.S. 223 (1988) 8

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 4, 5, 6, 7

STATUTES

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* 2, 5, 10

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* 2, 3, 5, 9, 10

Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.* 2

Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) 10, 11, 12, 13

Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. No. 99-509, §§ 9201-9204, 100 Stat. 1874, 1973-1980 (1986) 2, 5

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868 ..... 6, 7

136 Cong. Rec. (daily ed. Sept. 24, 1990) 11, 12

MISCELLANEOUS

Fed. R. Civ. P. 12(b)(6) 3

57 Fed. Reg. 10,626 (1992) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-809

LOCKHEED CORPORATION, *et al.*,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Underlying Facts. Respondent, Paul L. Spink, worked for Petitioners, Lockheed Corporation, et al. (Lockheed) between 1939 and 1950. Pet. App. at 2a. Mr. Spink was rehired by Lockheed in May 1979 at the age of 61. *Id.* At the time Mr. Spink was rehired, the terms of Lockheed's retirement plan (the Plan) excluded him from participating because he was over sixty years of age. *Id.* at 2a-3a.

In 1986, Congress passed the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (1986). *Id.* at 3a. OBRA amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age discrimination in participation and benefit accrual standards applied by employee benefit plans. *Id.* The OBRA amendments were effective for plan years beginning after January 1, 1988. *Id.*

Pursuant to the OBRA amendments, Lockheed allowed employees hired after age sixty to participate in the Plan after January 1, 1988. *Id.* Mr. Spink became a participant on the first day of the Plan's 1988 plan year. *Id.* at 3a-4a. Lockheed did not credit Mr. Spink with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. *Id.* at 4a.

In 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO). *Id.* The SRO offered increased retirement benefits to eligible employees as an incentive to terminate their

employment. *Id.* The increased benefits were paid out of the Plan's surplus assets. *Id.* In order to partake in the SRO, all Lockheed employees were required to sign a waiver releasing Lockheed from any potential employment related claims they might have against the company. *Id.* Mr. Spink did not elect to partake in the SRO. *Id.* Mr. Spink retired from Lockheed in June 1990. *Id.*

On February 5, 1992, Mr. Spink filed a complaint in the United States District Court for the Central District of California. *Id.* In his complaint, Mr. Spink challenged the release requirement of the SRO and alleged that the OBRA amendments to ERISA and ADEA entitled him and similarly situated employees to benefits under the Plan calculated on the basis of periods worked before and after January 1, 1988, the effective date of the statute. *Id.*

The district court's decision. Lockheed moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* at 5a. The district court granted Lockheed's motion and dismissed the complaint with prejudice. *Id.*

The Ninth Circuit's decision. The Ninth Circuit reversed the decision of the district court. First, the Ninth Circuit held that the OBRA amendments applied retroactively. *Id.* at 8a n.1. The Ninth Circuit also held that by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under § 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106 (a)(1)(D). *Id.* at 14a. A petition for a writ of

certiorari to the United States Court of Appeals for the Ninth Circuit followed.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision is erroneous for two distinct reasons. First, by holding that the OBRA amendments apply retroactively, the Ninth Circuit has acted in contravention of the language of the statute and has ignored the legislative history of the OBRA amendments. Moreover, the Ninth Circuit's holding is in direct conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

Second, the holding that Lockheed violated ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims, completely disregarded the edict of the Older Workers Benefit Protection Act which expressly recognizes that an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program. If the Ninth Circuit's decision is not overturned, employers may cease offering enhanced severance benefits to their employees at all. Employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

REASONS FOR GRANTING THE WRIT

I. THE DECISION REACHED BY THE NINTH CIRCUIT, THAT THE OBRA AMENDMENTS APPLY RETROACTIVELY, IS NOT AUTHORIZED BY THE LANGUAGE OF THE AMENDMENTS, IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *LANDGRAF v. USI FILM PRODUCTS*, AND CONTRAVENES THE LEGISLATIVE HISTORY OF THE AMENDMENTS

A. OBRA Amended ADEA and ERISA to Require Pension Accrual for Employees Working Beyond Normal Retirement Age Only for Plan Years Beginning On or After January 1, 1988

The language of the 1986 OBRA amendments supports the conclusion that they should not be applied retroactively. Section 9201 of OBRA amended ADEA by adding § 4(i) which requires pension accrual for employees working beyond normal retirement age for plan years beginning on or after January 1, 1988. Section 9202 of OBRA amended ERISA in an identical manner by amending § 204.

The language of the OBRA amendments expressly states that the amendments apply prospectively. Section 9204(a) provides that the OBRA amendments apply "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." § 9204(a), 100 Stat. at 1979. Thus, on its face, the statute does not apply to plan years prior to 1988.

In *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), this Court confirmed that statutes are presumed to apply prospectively "absent clear con-

gressional intent" favoring retroactivity. *Id.* at 1505. Given the absence of clear congressional intent to apply the 1986 amendments retroactively, and statutory language specifically stating that years previous to 1988 are outside the reach of the Act, years prior to 1988 must be exempt from pension accrual.

B. The Legislative History of the OBRA Amendments Makes Clear that the Legislation Does Not Apply to Years Prior to 1988

The legislative history of OBRA substantiates that Congress did not intend the amendments to apply retroactively. With respect to the impact of the OBRA amendments on ADEA, House Conference Report No. 99-1012 provides:

> It is the intention of the conferees, in adopting the amendments to ADEA (new § 4(i)), that the requirements contained in § 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan (as defined in section 3(2) of ERISA) shall constitute the *entire extent* to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions (as described in the provision). No inference is to be drawn by the addition of section 4(i) as to whether or to what extent employee benefit plans might have been required to provided benefit accruals or allocations to employees' accounts for employees protected under ADEA prior to the effective date of section 4(i).

H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 382 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4027 (emphasis added). Moreover, with respect to the effective date of the OBRA amendments, House Conference Report No. 99-1012 provides, "The conference agreement clarifies that the amendments apply to plan years beginning on or after January 1, 1988." *Id.*

Taken together, these statements confirm that Congress did not intend the OBRA amendments to have retroactive application. By stating no view on pension accrual or allocations "prior to the effective date of section 4(i)," and then explicitly making the effective date of the statute January 1, 1988, the House Conference Report substantiates that the OBRA amendments do not apply to plan years before 1988.

C. Retroactive Application of the OBRA Amendments Would Be Manifestly Unjust

In addition to the compelling reasons set forth above—retroactive application of the OBRA amendments is not authorized by the language of the statute, is in direct conflict with this Court's decision in *Landgraf*, and contravenes the legislative history of the OBRA amendments—another reason exists for this Court to grant the petition for certiorari. Specifically, retroactive application of the OBRA amendments would impose burdensome and inequitable results on employers.

In *Arizona Governing Committee v. Norris*, where the Supreme Court considered the constitutionality of Arizona's voluntary pension plan, this Court ruled that the plan violated Title VII, yet refused to approve an award of retroactive relief. 463 U.S. 1073 at 1106 (1983). The Court declined to impose retroactive relief on the grounds that such relief "would be both unprecedented and manifestly unjust." *Id.*

By rejecting the notion of retroactive relief under these circumstances, the Court correctly acknowl-

edged that "a retroactive remedy would have had a potentially disruptive impact on the operation of the employer's pension plan." *Id.* at 1106-07. Pension plans are not self funding. Rather, funding is based upon expected long-term payouts to plan participants. Unbudgeted pension payments must be made up from the employer's general revenues or from the assets of the pension plan itself. Unfunded liability will have a tremendous economic impact on pension plans. Retroactive pension costs would have to be funded out of revenues beyond those expected when plan contributions were made.

The City of New York—in a brief filed jointly with EEAC in *Florida v. Long*, 487 U.S. 223 (1988)—indicated that additional, unbudgeted pension payment requirements "could only come from the discretionary portion of the budget, i.e., the monies allocated for the delivery of sanitation, fire-fighting, police and other uniformed services." Brief in Support of Petitioners at 21 n.9, *Florida v. Long*, 487 U.S. 223 (1988) (No. 86-1685). Moreover, the uncertain nature of financial markets makes it essential for plan administrators to protect existing commitments against unforeseen decreases in plan assets. Retroactive application would add to this already difficult burden.[1]

Another reason this Court declined to approve the retroactive award of damages in *Norris* was that employers had reasonably assumed that their pension programs were lawful even if they did not require pension accruals after normal retirement age. 463 U.S. at 1106 (citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 720 (1978)). Similarly, in the instant case, to now impose a requirement on all employers to include pre-enactment service years when calculating accrued benefits will have a devastating effect on employers who—recognizing that such accruals were not required—did not fund their pension plans to provide for such accruals.

[1] In any event, because the 1986 OBRA amendments require all employers to accrue benefits past normal retirement age, applying the amendments only prospectively does not hamper their purpose. *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1099-1100.

In *Norris*, this Court held, "There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only." 463 U.S. 1073 at 1107 (footnote omitted). Thus, the Ninth Circuit erred by failing to examine its imposition of retroactive relief for its effects on other retirement plans, the economy, and on innocent third parties.

II. IF AFFIRMED, THE NINTH CIRCUIT'S DECISION WILL HAMPER THE USE OF EARLY RETIREMENT INCENTIVE PROGRAMS AND RELEASES CONTRARY TO THE INTENT OF CONGRESS

A. The Older Workers Benefit Protection Act Expressly Recognizes that an Employer May Obtain a Release or Waiver in Connection with an Exit Incentive or Other Employment Termination Program

The Ninth Circuit held that Lockheed acted in violation of ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims. ERISA is a statute which governs the administration of employer-provided benefit plans.

29 U.S.C. § 1003. ERISA does not, however, directly address the ability of an employer to obtain a release as a prerequisite to offering an exit incentive or other employment termination program. Nonetheless, the effect of the ruling below will be an inhibition on the use of exit incentive programs and releases. This result is contrary to Congressional intent in the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990) (OWBPA), the statute that recognizes Congressional approval of early retirement incentive programs and specifically sanctions the ability of employers to obtain a release in exchange for an exit incentive or other employment termination program.

In *Public Employees Retirement System of Ohio v. Betts*, this Court held that employee benefit plans were excepted from ADEA. 109 S. Ct. 2854 (1989). In response, Congress enacted OWBPA, which amended ADEA. OWBPA is a remedial statute intended both to emphasize ADEA's application to benefit plans and to ensure the ability of older workers to enjoy early retirement incentive programs without fear of age discrimination.

Through Title II of OWBPA, Congress reaffirmed the ability of employers to rely on "knowing and voluntary" waivers under ADEA. § 201, 104 Stat. at 983. As a safeguard to protect the interests of older workers, OWBPA created a series of protections for employers to follow in order to verify that a waiver is knowing and voluntary.[2] Moreover, OWBPA provides

[2] When a waiver or release is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees the process requires that (1) the waiver be part of a written agreement; (2) the waiver specifically refer to rights or claims arising under ADEA; (3) the employee may not waive rights or claims that may arise after the date the waiver is signed; (4) the employee waives rights or claims only in exchange for consideration in addition to anything of value to which the employee is already entitled; (5) the employee is advised in writing to consult with an attorney prior to signing the agreement; (6) the employee be given a period of 45 days during which to confer the agreement; (7) the employee be given at least 7 days to revoke the agreement; (8) the employer inform each employee in writing as to the class, unit, or group of employees covered by the program, any eligibility factors and any time limits applicable to the program; and (9) the employer inform each employee in writing as to the job titles and ages of all employees eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. § 7(f) § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

that in the event of any dispute over whether a waiver was knowing and voluntary, the party asserting the validity of the waiver has the burden of proving that each of the requirements was met. § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

OWBPA's passage affirms the validity of early retirement incentive programs. Indeed, the Statement of Managers[3] provides:

> We recognize that employees may welcome the opportunity to participate in such programs, and we do not intend to deprive employees of such

[3] OWBPA was the product of a compromise in the Senate that significantly modified the bill as previously reported by the Senate Labor and Human Resources Committee. The Statement of Managers had the effect of revising the prior legislative history.

opportunities or to deny employers the flexibility to offer such programs rather than resorting to involuntary layoffs.

136 Cong. Rec. S13,596 (daily ed. Sept. 24, 1990).

Congress clearly intended OWBPA to provide a safe harbor for exit incentives:

> [OWBPA] grants a safe harbor for the two most common forms of exit incentives: Pension subsidies and Social Security bridge payments. According to the General Accounting Office, as many as two-thirds of the early retirement incentives offered by employers take one of these two forms. . . . This bill now immunizes from challenge two-thirds of the early retirement incentive programs offered by employers today.

136 Cong. Rec. S13,603 (daily ed. Sept. 24, 1990) (Statement of Sen. Pryor).

In July 1992, EEOC solicited public comment on certain provisions of OWBPA. 57 Fed. Reg. 10,626 (1992). In response, the principal authors of OWBPA [4] sent a letter which provided as follows:

> Congress intended this protective legislation to be liberally construed in order to effectuate the remedial purposes of prohibiting discrimination in the areas of employee benefits and providing safeguards for individuals who are asked to waive their rights under ADEA.

[4] The principal authors of OWBPA were Senator Pryor (D-Arkansas), Senator Howard Metzenbaum (D-Ohio), Representative Matthew Martinez (D-California), Representative William L. Clay (D-Missouri), Representative Edward R. Roybal (D-California), and Representative William D. Ford (D-Michigan).

Thus, the principal authors of OWBPA affirmed the legitimacy of employers' use of "knowing and voluntary" waivers under ADEA. In direct contravention of the intent of OWBPA's principal authors, the Ninth Circuit's decision jeopardizes the ability of employees to receive additional benefits to which they would not otherwise be entitled in exchange for signing a release.

B. Employers May Cease to Offer Enhanced Benefits to Employees at All if They Are Denied the Ability to Obtain Releases

Like Lockheed, many employers who are faced with the necessity of workforce reductions offer generous severance benefits, far in excess of any to which employees otherwise would be legally entitled. These programs offer substantial financial benefits to employees. Some employers offer early retirement incentives and other voluntary termination programs in lieu of layoffs. Because employers voluntarily offer benefits in excess of those that they are legally obligated to provide, employers frequently require employees who choose to accept these additional benefits to execute a waiver of claims in return. In this manner, an employer buys a litigation-free future in exchange for awarding substantial extra benefits to employees.

OWBPA already places a significant administrative burden on employers who wish to secure releases in exchange for supplemental severance benefits. Congress was aware of this burden, but deemed it necessary in order to protect employees against the possibility of being coerced or misled into signing releases that were not truly knowing and voluntary.

The administrative burden placed on employers who seek releases will be increased well beyond the level envisioned by Congress in OWBPA, however, if this Court adopts the Ninth Circuit's holding. If employers are denied the ability to obtain releases, it follows that they will cease offering enhanced severance benefits to their employees at all. Employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

CONCLUSION

For the foregoing reasons, EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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No. 95-809

In The

Supreme Court of the United States

October Term, 1995

LOCKHEED CORPORATION, *et al.*,

Petitioners,

v.

PAUL L. SPINK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Lockheed Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents over 215,000 businesses and professional organizations, as well as several thousand state and local chambers of commerce, and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases pending or recently decided in this Court: *Varity Corp. v. Howe*, 115 S. Ct. 179 (1995), *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), *District of Columbia v. The Greater Washington Board of Trade*, ___ U.S. ___, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, ___ U.S. ___, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. In particular, they have a substantial interest in ensuring that the statute is interpreted and applied in a uniform and consistent manner across the nation, because many of these plans cover participants and beneficiaries in multiple states.

The misguided decision below, which throws into doubt the validity of most amendments to pension plans covered by ERISA and imposes retroactive liability on those which took advantage of lawful provisions of ERISA as originally enacted, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive and prospective liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans.

We believe this Court's review is urgently needed. In terms of the breadth and seriousness of the impact – not just on employers but also on the federal judiciary – the first question presented in this case paints much the same picture as *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), in which the Court granted the Chamber's motion for leave to participate *amicus curiae*.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the

consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether contrary to the holdings of nine other circuits, the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan.

2. Whether the Ninth Circuit correctly held that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA"), applies retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation, in the absence of any clear intent by Congress to impose retroactive liability for pension benefits.

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AS TO THE FIRST QUESTION PRESENTED, MORE THAN BEING WRONG AND CREATING A CONFLICT AMONG THE CIRCUITS, THE DECISION BELOW REPLACES A BRIGHT LINE TEST WITH A JUDGMENT OF DEGREE, VISITING ENORMOUS, UNINTENDED AND UNNECESSARY COSTS ON EMPLOYERS, PLANS AND THE FEDERAL JUDICIARY 4

II. AS TO THE SECOND QUESTION PRESENTED, RETROACTIVE APPLICATION OF OBRA '86 PRODUCES A MULTIPLIER EFFECT THAT WOULD IMPOSE SERIOUS FINANCIAL BURDENS ON PLANS FAR BEYOND ANYTHING THAT CONGRESS INTENDED 12

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Commissioner v. Keystone Consolidated Industries, Inc., 113 S. Ct. 2006 (1993) 5

Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995) 2, 11, 12

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 11

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 20

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 13, 19

Wood v. Commissioner, 955 F.2d 908 (4th Cir. 1992) 5

STATUTES

Employee Retirement Income Security Act of 1974:

Section 202, 29 U.S.C. § 1052 14

Section 203, 29 U.S.C. § 1053 .... 6, 14

Section 203(a)(2), 29 U.S.C. § 1053(a)(2) 14

Section 204(b)(1), 29 U.S.C. § 1054(b)(1) 13

Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) 10

Section 406(a), 29 U.S.C. § 1106(a) 4, 6, 7

Section 409, 29 U.S.C. § 1109 10

Omnibus Budget Reconciliation Act of 1986:

Section 9201, amending section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(i)(1) 16

TABLE OF AUTHORITIES – Continued

Page

Section 9203(a), 100 Stat. 1979 (1986) 15

Section 9204(b), 100 Stat. 1980 (1986) 15

LEGISLATIVE HISTORY

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 262 (1974) 15

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 46 (1974) 15

OTHER AUTHORITIES

Top 50 – A Survey of Retirement, Thrift, And Profit Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of January 1, 1988, The Wyatt Company (1988) 19

Trends in Pensions 1992, U. S. Department of Labor, Pension and Welfare Benefits Administration....8, 19

INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. As to the first question presented, the decision below is not only wrong and in conflict with the decisions of other courts of appeal. The nature of the error is to replace a bright line test with a judgment of degree that casts doubt over the validity of most, if not all, amendments to pension plans, both retroactively and prospectively, and invites needless, costly litigation in the federal courts over the validity of individual amendments.

In the prohibited transaction provisions of ERISA, Congress decreed absolute prohibition, without consideration of any mitigating factors, reasoning that a test involving judgment would leave employers and plan administrators to guess at the consequences of their actions and would enmesh the federal courts in endless litigation over individual transactions. By the use of definitions, however, and drawing on the common law of trusts, Congress made clear that traditional "settlor" functions, such as designing, amending and deciding to terminate a plan, were off limits from the fiduciary rules (including the prohibited transaction rules). This demarcation is absolutely necessary, since settlor functions (where the settlor is expected to act in its own best interest) are inherently incompatible with fiduciary rules (where the fiduciary must act solely in the interest of the participants in the plan).

The decision below ignores the demarcation between settlor and fiduciary functions, holding that the settlor function of amending a plan *is* subject to the fiduciary

rules, including the prohibited transaction rules. But the worst of the problem comes next. Implicitly recognizing that the prohibited transaction rules would make it impossible to perform settlor functions, the decision below is forced to abandon the bright line test for prohibited transactions that Congress established in ERISA and make up a new test, a judgment of degree: transactions are prohibited depending on whether the benefit to the employer is more than "incidental."

Replacing a bright line test with a judgment of degree visits on employers and plan administrators the very burdens that Congress sought to avoid in establishing the bright line test. It casts into doubt the validity of most amendments previously made to pension plans and leaves employers quite uncertain about the validity of future plan amendments. It leaves plan administrators uncertain about the terms of the plans they administer. And it enmeshes the federal courts in deciding the validity of countless individual plan amendments, whether in an action by employees to invalidate an unfavorable amendment or by the plan administrator seeking to settle the terms of the plan. In this regard, the decision below carries much the same effects as the court of appeals decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), and makes an equally compelling case for this Court's review.

II. As to the second question presented, the nature of the error is not just to impose a marginal increase in liability on pension plans. By applying the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86") retroactively, the decision below has a multiplier effect that will impose on pension plans very significant liabilities – potentially over a billion dollars – beyond the burden that Congress intended to place upon them.

There is no disagreement over the fact that, in ERISA, Congress expressly permitted pension plans to exclude employees hired within 5 years before normal retirement age (*i.e.*, before age 60 in the typical plan). There is no doubt that in OBRA '86, Congress reversed itself and forbade the exclusion. The question is whether the reversal requires that such employees participate prospectively, receiving pensions based on their service after OBRA '86 or, as the court of appeals held, requires that such employees be treated as having participated retroactively from their date of hire.

The multiplier effect comes from the fact that pensions are typically based on the number of years of participation in the plan. If an older employee begins to participate after OBRA '86, he may accrue a benefit based on just a few years of service and therefore impose a modest new liability on the plan. If he must be given retroactive credit for service from his date of hire (before OBRA '86), the effect can easily triple or quadruple his pension and therefore triple or quadruple the funding burden on the plan. When the effect is multiplied across the universe of pension plans and the number of affected employees, the liability imposed on plans by the decision below might reach $1.7 billion – a liability never intended by Congress that may, ironically, lead to the reduction or elimination of pension plans.

ARGUMENT

I. AS TO THE FIRST QUESTION PRESENTED, MORE THAN BEING WRONG AND CREATING A CONFLICT AMONG THE CIRCUITS, THE DECISION BELOW REPLACES A BRIGHT LINE TEST WITH A JUDGMENT OF DEGREE, VISITING ENORMOUS, UNINTENDED AND UNNECESSARY COSTS ON EMPLOYERS, PLANS AND THE FEDERAL JUDICIARY.

The petition for *certiorari* clearly establishes the conflict among the circuits on the first question presented, persuasively demonstrates the error of the decision below, and shows the importance of the error. In this brief, the Chamber would like to underline and expand on the importance of the error by describing its broad and deleterious effect on pension plans and their sponsors, as well as on the federal courts.

The nature of the error is the key to its effects. In ERISA, Congress carefully defined who is a fiduciary and then flatly prohibited a fiduciary from causing an employee benefit plan to engage in a well-defined list of prohibited transactions. ERISA section 406(a), 29 U.S.C. § 1106(a). Among the prohibited transactions are transactions in which the assets of the plan are used for the benefit of a party in interest, such as the employer who sponsors the plan.[1] Thus, a "fiduciary" may not cause a

[1] In pertinent part, section 406(a) of ERISA provides:

A *fiduciary* with respect to a plan shall not cause the plan to engage in a *transaction*, if he knows or should know that such transaction constitutes a direct or indirect –

(D) transfer to, or use by or for the benefit of, a *party in interest* of any assets of the plan . . .

29 U.S.C. § 1106(a) (emphasis added).

plan to engage in a "transaction" in which the assets of the plan are used for the benefit of a "party in interest."

Congress deliberately made the prohibition absolute, without regard to the motives of the fiduciary or the effect on the participants in the plan or any other consideration whatsoever, so as to create a bright line. Congress understood very well that a flat prohibition would bar not only abusive transactions but also some innocuous transactions. It decided, however, that the advantages of a bright line outweighed the disadvantages. The advantages, of course, were letting sponsors and administrators of plans know in advance what was impermissible (without exposing themselves to personal liability through trial and error) and removing the need for decades of federal litigation to refine the rules.[2]

At the same time, there are a number of functions commonly (and properly) performed with respect to employee benefit plans that simply could not be performed if they were subject to the fiduciary rules of ERISA, including the prohibited transaction rules. Foremost among them are (1) designing and establishing an employee benefit plan, (2) amending an employee benefit plan, and (3) deciding to terminate an employee benefit plan. As explained below, an employer almost always acts in its own self-interest in establishing, amending or

[2] Discussion of the background and purpose of the fiduciary rules can be found in *Wood v. Commissioner*, 955 F.2d 908 (4th Cir. 1992), which this Court cited with approval in *Commissioner v. Keystone Consolidated Industries, Inc.*, 113 S. Ct. 2006 (1993), saying, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."

terminating a plan – a fact of life that would be incompatible with a fiduciary duty to act solely in the interest of the participants in the plan.[3]

With the exception of the decision below, every court of appeals to consider the question has wisely concluded that creating, amending and terminating a plan are not fiduciary functions at all but are settlor functions. Not being fiduciary functions, they are off limits from the fiduciary rules of ERISA, including the prohibited transaction rules. Thus, every other circuit has avoided painting itself into the corner where these settlor functions would be subject to fiduciary rules that would make them impossible to perform. The U. S. Department of Labor, the agency with authority to interpret and apply the fiduciary rules of ERISA, firmly and unequivocally agrees, as noted in the petition.

The decision below, contrary to all the other circuits that have considered the question, concludes that amending an employee benefit plan *is* subject to the fiduciary rules of ERISA, particularly the prohibited transaction rules.[4] Having painted itself into a corner, however, the

[3] The language and structure of ERISA are replete with indications of the understanding (and approval) of Congress that employers act in their self interest in designing, amending and terminating plans. To take one prominent example, in section 203 of ERISA, 29 U.S.C. § 1053, Congress permitted employers to impose a vesting requirement in a pension plan – a requirement that an employee work for the employer for at least a minimum number of years before becoming entitled to a pension. Vesting requirements obviously serve the interest of the employer, not the employee, but are permitted without being tested against any fiduciary standard.

[4] Since, by the express terms of ERISA section 406(a), a prohibited transaction occurs only where a *fiduciary* causes a

decision below compounds the error by mangling the prohibited transaction rules in order to escape. Implicitly recognizing that the prohibited transaction rules of ERISA *as written* would absolutely prohibit virtually all amendments to pension plans (under its theory that amendments are subject to those rules), the decision below simply ignores the absolute prohibition established by Congress and instead invents a new, variable standard: an amendment is prohibited if the benefit to the employer is more than "incidental" but not if the benefit is merely "incidental."

Aside from the simple conclusion that the decision below is wrong, therefore, the effect of the error is to obliterate the *bright line* test established by Congress and substitute a judgment of *degree* that requires particularized inquiry into the facts and circumstances of every individual case. As a result, employers will be uncertain whether a proposed amendment to a plan would be a prohibited transaction. Plan administrators, as fiduciaries, will be uncertain whether to recognize amendments as lawful. Participants in the plans will have a new and potent weapon to attack amendments (or portions of amendments) that are not to their liking. And the federal courts will be forced into the business of examining

plan to enter into a transaction, the decision below, by finding a violation of section 406(a), necessarily includes the conclusion that Lockheed acted as a fiduciary in amending the plan. Footnote 5 in the opinion below should not be understood to the contrary. It recites only that the court of appeals did not rule on a separate claim under a different section – a claim that Lockheed generally acted as a fiduciary and therefore was subject to the general fiduciary duties of section 404(a) (the prudent man rule, exclusive benefit rule, etc.).

amendments individually to determine whether the benefit to the employer is "incidental" or not. These are the very costs and burdens that Congress sought to avoid with a bright line test.[5]

Some elaboration on the effects may be helpful to appreciate the importance of the error below. There should be no doubt that virtually all amendments to plans benefit the employer, at least indirectly. After all, employers are not eleemosynary institutions; they pay wages and benefits in order to gain a benefit for themselves.

The benefit to the employer may be simple labor. Or the benefit to the employer may be more elaborate. For example, an employer with a pension plan might amend the plan to add early retirement benefits in order to attract employees from competitors whose pension plans offer early retirement. Or an employer might amend a pension plan to increase pension benefits in lieu of an increase in wages. Or an employer facing a strike and charges of unfair labor practices might settle the strike by agreeing to amend its pension plan to improve pension benefits. To varying degrees, the employer always benefits from amending a plan – by getting labor, by attracting talented employees from its competitors, by relieving pressure for higher wages, or by settling a strike and unfair labor practice charges, just to cite a few examples.

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[5] The analysis of the court of appeals applies to all employee benefit plans covered by ERISA that have assets, that is, almost all pension plans and some welfare plans. According to the U. S. Department of Labor, there were 730,106 pension plans alone covered by ERISA in 1988. *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 602.

If plan amendments really were subject to the fiduciary rules of ERISA, and a prohibited transaction were a question of degree (as the decision below holds), an employer would hesitate to amend its pension plan, even to raise benefits – a result clearly at odds with the intent of Congress in ERISA to encourage pension plans to provide retirement security for employees. The only safe course for the employer would be to freeze or terminate the existing plan and start a new plan that embodied the desired plan amendment.[6] But it cannot have been the intent of Congress to force upon employers such an unnecessary and wasteful exercise as freezing the existing plan (and then running the frozen plan and the new plan simultaneously), or else terminating the existing plan, just to make an amendment.[7]

Consider the problem from the point of view of the plan administrator. As a fiduciary under ERISA, the plan

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[6] Respondent and his *amici* in the court below all agreed that the act of creating a new plan cannot involve a prohibited transaction, even on their theory that amending a plan involves the fiduciary rules of ERISA, because a new plan has no assets until after it is established. Thus, they agreed that a new plan could have the very feature that, if added to an existing plan, would constitute a *per se* prohibited transaction under ERISA. Common sense rebels at this bizarre dichotomy, which finds no basis in ERISA, but if it is the law, employers will be forced to make use of it, as described in the text.

[7] Since ERISA does not require welfare plans to be funded at all, those employers which have chosen to enhance the security of the benefit. by funding them would find that they are hamstrung by the decision below, whereas there would be no problem if the plan were unfunded. Ironically, therefore, the decision below, which pays lip service to increasing the security of employees in their benefits, would exert irresistible pressure on employers to abandon funding of their welfare plans.

administrator has a duty not to give effect to plan amendments that constitute prohibited transactions. ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). But the plan administrator would be uncertain whether any particular amendment benefits the employer to the degree where it becomes prohibited, and the plan administrator would be ill equipped to make the necessary investigation and judgment.[8] Moreover, the plan administrator would face personal liability under ERISA for deciding that question wrong. If the plan administrator implemented a plan amendment, for example, and it was later determined that the amendment was void as a prohibited transaction under ERISA, the plan administrator could be personally liable to make the plan whole for all benefits paid under that amendment. ERISA section 409, 29 U.S.C. § 1109.[9]

There is even worse news from the perspective of the federal judiciary. In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to whether particular

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[8] This would be all the more true where the plan is administered by an independent third party known as a "third-party administrator." A third-party administrator's expertise is in day-to-day administration of plans; typically, the third-party administrator has little knowledge of the employer's business. It would be fanciful to expect third-party administrators to judge whether plan amendments benefit the employer more than "incidentally" and are therefore void as prohibited transactions.

[9] This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or capricious" standard of review. The validity of a plan amendment under the prohibited transaction rules of ERISA would be a question of law as to which the plan administrator receives no deference.

amendments are lawful or, instead, are prohibited transactions. This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

The need to seek a declaratory judgment will be heightened by considerations of forum-shopping. As the petition points out, *challenges* to amendments can be brought in the Ninth Circuit with respect to employers nationwide, given the interstate reach of many employee benefit plans and the liberal venue and universal service of process provisions of ERISA. To protect themselves against such forum-shopping, administrators of plans nationwide will be forced, as a practical matter, to launch pre-emptive strikes – declaratory judgment actions seeking to *validate* amendments – in the circuits that disagree with the Ninth.

Needless to say, whether due to a challenge or in an action for declaratory judgment to validate an amendment, enmeshing the federal courts in analyzing the degree of benefit to an employer from each amendment represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

In sum, as to the first question presented, this case presents a picture strikingly similar to what the Court saw last term in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995). In *Curtiss-Wright*, a plaintiff dissatisfied with the employer's legal authority to amend a plan concocted the extreme new theory that the standard language in plans, reserving to employers the authority to amend the plan, is legally insufficient under ERISA, thus

casting doubt on the validity of nearly all plan amendments adopted since ERISA and creating an entire new class of ERISA litigation as participants and plan administrators litigate the validity of individual plan amendments. Apart from the legal theory for invalidating the plan amendments, this case is the same.

The shock wave in *Curtiss-Wright* was shaped a little differently from this case. *Curtiss-Wright* applied to both pension and welfare plans but had mainly retroactive effect. (Prospectively, an employer could solve the *Curtiss-Wright* problem by modifying the amendment language in the plan.) This case applies mainly to pension plans but has both retroactive and *unlimited prospective* effect. Here, the source of the problem is not plan language, which the employer can modify, but the statutory provisions regarding prohibited transactions, which will continue to apply to (and call into question) future pension plan amendments, if the decision below stands.

Over-all, the destructive force of the decision below on employers, plans and the federal judiciary is comparable to the court of appeals decision in *Curtiss-Wright*, particularly because of the open-ended prospective effect. In *Curtiss-Wright*, the Chamber urged the Court, in unusually strong terms, to accept the case and reverse the decision, and it did so. We respectfully urge the same in this case as to the first question presented.

II. AS TO THE SECOND QUESTION PRESENTED, RETROACTIVE APPLICATION OF OBRA '86 PRODUCES A MULTIPLIER EFFECT THAT WOULD IMPOSE SERIOUS FINANCIAL BURDENS ON PLANS FAR BEYOND ANYTHING THAT CONGRESS INTENDED.

The decision below gives retroactive effect to statutory provisions as to which Congress clearly expressed its

intention that application be prospective only, as explained in the petition, thus bringing the decision below into conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). The Chamber would like to underline the retroactive nature of the decision below and point out the serious consequences for defined benefit pension plans, where retroactivity produces, not a marginal increase in liability, but a multiplier effect.

The key to this issue is understanding how benefits accrue under a defined benefit pension plan. With a few exceptions not relevant here, benefits accrue ratably over the period that the employee participates in the plan. For example, a typical pension plan might provide a monthly benefit at retirement of $50 multiplied by the number of years that the employee has participated in the plan. If an employee works 30 years and retires, his monthly pension is $1,500. In this example, the employee's pension has accrued ratably over 30 years, at a rate of $50 per year.

There is obvious logic to accrual of pensions ratably over the working life of the employee, since the amount of pension is roughly proportional to the amount of work that the employee has performed for the employer. This result is not only reasonable and fair, however; it is the law. ERISA expressly requires that, for each year of participation in the plan, an employee accrue a ratable share of his ultimate pension benefit. ERISA section 204(b)(1), 29 U.S.C. § 1054(b)(1).[10]

[10] Congress mandated ratable accrual of pension benefits under ERISA in order to prevent avoidance of ERISA's vesting requirement. The vesting requirement, as originally enacted, called for all participants in pension plans to become fully

Since length of participation in the plan generally determines the amount of pension, ERISA closely regulates the matter of when employees begin participation in pension plans. ERISA section 202, 29 U.S.C. § 1052. Among the original participation rules, ERISA expressly permitted a plan to exclude from participation employees who were hired less than five years before normal retirement age. (Since normal retirement age is typically 65, this permitted the typical plan to exclude employees hired after age 60.)

ERISA permitted this exclusion of employees hired after age 60 for a very specific reason. Pensions are generally funded over the working life of the employee. For most employees, that means a period of decades, which permits the plan to accumulate the necessary assets gradually over many years. On the other hand, if an employee could join a plan and retire just one or two years later, it would impose a large, unexpected liability on the plan, which the plan would be unable to finance over a long

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vested in their "accrued benefit" after 10 years of service (or according to two alternative schedules). ERISA section 203(a)(2), 29 U.S.C. § 1053(a)(2). For an employee who joined a plan at age 25, 10 years would represent one quarter of his anticipated period of participation of 40 years, assuming he stayed until age 65.

Congress anticipated that an unscrupulous employer might provide only token accrual of benefits during the early years of an employee's participation in plan, so that employees might become vested but only in trivial pension benefits. To give meaning to the vesting requirement in section 203, therefore, Congress went on immediately in section 204 to require that pension benefits accrue ratably over the employee's period of participation in the plan. In this way, the employee in our example, who becomes vested after 10 years of participation, becomes vested in a substantial benefit – one quarter of his normal retirement benefit.

working life. Accordingly, Congress permitted plans to exclude such employees altogether.[11]

In accordance with ERISA, the Lockheed plan, like many others, lawfully excluded from participation employees who were hired within 5 years before normal retirement age. As a result, when Mr. Spink was hired in this case in 1979 at age 61, he was lawfully excluded from the pension plan. Since he did not participate, he did not accrue any benefit under the plan.

In 1986, Congress changed ERISA so that pension plans could no longer exclude employees from participation merely because they were hired after a certain age. Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), section 9203(a), 100 Stat. 1979 (1986). Congress said that the change in the law applied "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA '86, section 9204(b), 100 Stat. 1980 (1986). It is difficult to imagine a clearer specification of prospective effect.

Accordingly, when OBRA '86 took effect with respect to the Lockheed pension plan in 1988, Mr. Spink became entitled to participate in the Lockheed pension plan, but "only with respect to service performed on or after such date." The plan was duly amended to provide that Mr. Spink was permitted to participate on the OBRA '86 effective date, and he did in fact begin to participate in the plan in 1988. Since the amount of benefit depends on the length of participation in the plan, Mr. Spink's benefit was thereafter calculated by reference to the length of his

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[11] *See, e.g.*, H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 262 (1974), and H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 46 (1974).

actual participation in the plan, that is, from and after the effective date of OBRA '86 in 1988.

What Mr. Spink sought, and the court of appeals granted him, was credit for the period from his hiring to the effective date of OBRA '86 – from 1979 to 1988. It is a historical fact that Mr. Spink was excluded from the plan during those years – that is, he did not in fact participate in the plan – and no one challenges the legal conclusion that such treatment was lawful when it occurred. By holding that OBRA '86 requires that credit be granted for that period, the decision below effectively makes unlawful today an exclusion that was lawful when it occurred, and therein lies the retroactivity. The decision below treats Mr. Spink the same as if OBRA '86 had been the law ever since ERISA was passed.

The rationale given in the opinion below relates to a different provision of OBRA '86. Having assured all employees of the right to participate in a pension plan regardless of old age, Congress wanted to assure that they would continue to accrue benefits regardless of age. So, in a separate provision of OBRA '86, it prohibited any plan provision cutting off accrual of benefits because of age. And, anticipating that an unscrupulous employer might avoid that prohibition by merely reducing the rate of accrual (rather than cutting it off entirely), Congress added that the same prohibition applied not only to "the cessation of an employee's benefit accrual" but also to "the reduction of the rate of an employee's benefit accrual" because of age. OBRA '86, section 9201, amending section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(i)(1).

For example, if employees accrue pension benefits under a plan at a rate of $50 per year of participation, it is unlawful for a plan to provide that the rate of accrual is

reduced to $10 for years of participation occurring after age 65. That provision has no application to Mr. Spink, of course. Under the Lockheed plan, the rate of accrual does not change merely because the participant reaches any age. Mr. Spink's rate of accrual was the same at all times and, furthermore, the same as all other participants in the plan, both under and over age 65. If anything, his rate of accrual *increased* by reason of his joining the plan – going from zero (when he did not participate) to the regular rate of accrual under the plan (when his participation began). Since the plan does not provide any reduction in rate, and Mr. Spink did not suffer any reduction in rate, the OBRA '86 ban on plan provisions reducing the rate of accrual by reason of age clearly has no application to this case and certainly cannot be used to justify retroactive application of the rule that older employees be permitted to participate from and after 1988.

The effect of the decision below on pension plans is immediate and severe. OBRA '86 already imposed an unexpected, new liability on pension plans when it required that employees hired after age 60 be permitted to participate prospectively. Remember, in 1974, when ERISA was enacted, Congress considered the financial burden from such a requirement too great and, accordingly, enacted the exception for employees hired within 5 years of normal retirement age. In OBRA '86, Congress changed its mind and decided to impose that burden on pension plans. Thus, even *prospective* application of OBRA '86 creates a new financial burden on plans, but there is no doubt that Congress chose to impose that burden – prospectively.

The decision below compounds the burden by its retroactivity: not only must pension plans accept the older employee as a participant and fund his pension

over a short period of time, under the decision below the pension must be inflated by taking into account the prior period when the employee did not in fact participate. For example, suppose that an employee was hired in 1983 at age 60 and was excluded from the pension plan. In 1988, OBRA '86 takes effect and he joins the plan. In two more years, he retires. Applying OBRA '86 prospectively, he has two years of participation. Applying OBRA '86 retroactively (in accordance with the decision below), he has seven years of participation. That means he receives more than triple the benefit, and the financial burden on the plan is more than three times greater, than if OBRA '86 were applied prospectively.[12]

The absolute dollars associated with this multiplier effect are very substantial. Using the same example, the monthly pension of our sample employee at retirement would be $100 if OBRA '86 were applied prospectively (2 years of participation at an accrual rate of $50 per year) versus $350 if OBRA '86 were applied retroactively (7 years at $50). Using the rates promulgated by the Pension Benefit Guaranty Corporation for valuing annuities, the value of a $100 monthly pension was $9,225 in 1988 and of a $350 monthly pension was $32,287. The difference – $23,062 – would have been the increase in cost to the plan in 1988, for just this one employee, if OBRA '86 had been applied retroactively. Today, eight years after OBRA '86 took effect, the cost of retroactive application is $53,433 – considerably more than double that amount.

[12] This is a modest example. The multiplier effect is even greater in the case of Mr. Spink himself, who had approximately 9 years of service before the OBRA '86 effective date and only a year and a half afterward, yielding a multiplication factor of more than seven.

While we are not aware of data showing exactly how many employees would be affected by retroactive application of OBRA '86 nationwide, the order of magnitude certainly can be estimated. According to the U. S. Department of Labor, in 1988 there were 32,166,000 participants in private, single-employer, defined benefit pension plans.[13] Multiply that by 37 percent to estimate the number of participants in plans that took advantage of the original ERISA provision permitting exclusion of employees hired after age 60.[14] Multiply that by the ratio of affected individuals to total participants, using the Lockheed plan as an example, and the estimate would be over 32,000 individuals affected nationwide.

If the cost of retroactive application of OBRA '86 for a typical participant were $53,433 today, the total cost nationwide could therefore be as high as $1.7 billion today. Even if the actual cost were half the estimate, it could still be fairly characterized as very substantial – certainly substantial enough that Congress should not be found to have imposed it on the nation's pension plans absent a clear intent to do so, in accordance with *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

In summary on the second question presented, the decision below not only commits error but does so in a way that dramatically multiplies the liability, resulting in a financial burden on plans far greater than Congress

[13] *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 603.

[14] This percentage is derived from a published survey of the largest salaried pension plans of 50 of the largest manufacturing companies in the United States in 1988. *Top 50 – A Survey of Retirement, Thrift, And Profit Sharing Plans Covering Salaried Employees of 50 Large U. S. Industrial Companies as of January 1, 1988*, The Wyatt Company (1988).

could ever have envisioned from the prospective application that it clearly set forth in OBRA '86. This Court's review is urgently needed.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers and plans, and the time has come to do so again.

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(9)

No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
vs.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Certiorari Granted January 19, 1996

99 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries From Courts Below 1

Complaint 4

Nature Of The Action 5
Jurisdiction And Venue 6
Facts Common To All Causes Of Action 6
Class Action Allegations 12

Count I: Violation Of ERISA's Prohibition Of Age Discrimination 14
Count II: Violation Of Age Discrimination In Employment Act 18
Count III: Breach Of Fiduciary Duty Under ERISA 20
Count IV: ERISA – Failure To Follow Terms Of Plan 24
Count V: Promissory Estoppel 26

Prayer For Relief 27

Defendants' Notice Of Motion And Motion To Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) 30

Lockheed's Response To Plaintiff's First Set Of Requests For Admissions Propounded To Defendant Lockheed Corporation (Excerpt From Exhibit B To Gordon E. Krischer's Declaration In Support Of Defendants' Motion To Dismiss) 32

Letter From Tellep To Spink (Exhibit A To Lockheed's Response To Plaintiff's First Set Of Requests For Admissions) 34

Declaration Of Robert G. Kropf In Support Of Defendants' Motion To Dismiss 37

Relevant Provisions Of The Lockheed Retirement Plan For Certain Salaried Employees, As Amended December 17, 1990 (Excerpts From Exhibit A To Declaration Of Robert G. Kropf) 39

Section 1.01: Administrator Of The Plan 39
Section 1.10: Credited Service 39
Section 1.11: Employee 39
Section 1.14: Hour Of Service 39
Section 1.16: Member 41
Section 1.20: Plan Year 41
Section 1.27: Week Of Service 41
Section 1.29: Year Of Service 41
Section 2.01: Commencement of Membership 41
Section 4.01: General 42
Section 4.04: Future Service For Benefit Calculation Purposes 42
Section 5.01: Normal Retirement 44
Section 5.02: Early Retirement 44
Section 13.01: Named Fiduciary 45
Section 13.02: Responsibilities Of Named Fiduciaries 46
Section 13.03: Allocation of Responsibilities . . . 48
Section 14.01: Amendment Of Plan 48
Section 15.02: 1990 Special Retirement Program 49
Section 15.03: 1990 Voluntary Retirement Program 53

Relevant Provisions Of The Lockheed Retirement Plan For Certain Salaried Employees In Effect As Of May 17, 1979 (Excerpts From Exhibit B To Declaration Of Robert G. Kropf) 58

Section 1.16: Member 58
Section 2.01: Commencement of Membership 58

Lockheed Corporation Board Of Directors' Certified Copy Of Resolutions Adopting The 1990 Special Retirement Opportunity (Excerpts From Exhibit C To Declaration Of Robert G. Kropf) 59

District Court Opinion And Order 62

Respondent's Notice Of Appeal To The United States Court of Appeals For the Ninth Circuit . . . 73

Ninth Circuit Opinion And Order 76

Ninth Circuit Order Denying Petition For Rehearing 95

RELEVANT DOCKET ENTRIES FROM COURTS BELOW*

District Court Docket Entries
Spink v. Lockheed Corp., et al.,
Case No. CV 92-0800 SVW (GHKx)

Date	Description
2/5/92	Complaint filed and summons issued; Demand for Jury Trial
4/2/92	Defendants filed Notice of Motion and Motion to Dismiss Complaint
4/2/92	Declaration of Gordon E. Krischer in Support of Motion to Dismiss
4/2/92	Declaration of Robert G. Kropf in Support of Motion to Dismiss
4/27/92	Motion to Dismiss argued; Court issued minute order taking Motion to Dismiss under submission
7/31/92	Court issued order granting defendants' Motion to Dismiss plaintiff's Complaint in its entirety and dismissed plaintiff's Complaint with prejudice for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). Judgment entered on 7/31/92
8/27/92	Plaintiff filed Notice of Appeal to the Ninth Circuit Court of Appeals from the District Court's order entered 7/31/92. Fees paid.

* For the Court's convenience, the docket entries set forth below have been revised and reworded by the parties to more accurately and clearly reflect the actual entries contained in the dockets of the District Court for the Central District of California and of the United States Court of Appeals for the Ninth Circuit.

Ninth Circuit Docket Entries
Spink v. Lockheed Corp., et al.,
Docket No. 92-56094

Date	Description
9/9/92	Docketed cause and entered appearances of counsel
2/8/93	Filed Motion of International Union of Petroleum and Industrial Workers for Leave to file amicus brief along with its amicus brief
2/19/93	Filed Motion of American Association of Retired Persons (AARP) for Leave to file amicus brief
2/22/93	Received AARP amicus brief
4/1/93	Received letter dated 3/31/93, from Gordon E. Krischer, Esq., counsel for appellees, and Bert Voorhees, Esq., counsel for appellant re: The undersigned parties' consent to the filing with the U.S. Court of Appeals of a brief by each of the following amicus curiae, pursuant to FRAP 29: (1) The American Assoc. of Retired Persons; (2) The International Union of Petroleum and Industrial Workers; and (3) The ERISA Industry Committee
4/1/93	Received amicus brief of ERISA Industry Committee
4/26/93	Filed certified record on appeal in one volume (total); 0 Clerks record; 1 RT
10/18/93	Filed certificate of record on appeal. RT filed in District Court on 12/18/92

Date	Description
1/12/94	Filed supplement to certified record on appeal (filed 4/26/93) in two volumes; 2 Clerk's record; 0 RT
2/1/94	Argued and submitted to Dorothy W. Nelson, Stephen R. Reinhardt, Melvin Brunetti
7/18/95	Filed Opinion: Reversed in part; affirmed in part (Spink's request for attorneys' fees is granted). Dorothy W. Nelson; Stephen R. Reinhardt; Melvin Brunetti, author. Filed and entered judgment
8/1/95	Filed original and 40 copies of Appellees Lockheed Corp., et al. petition for rehearing with suggestion for rehearing en banc, 15 pages (panel & all active judges); served on 7/31/95
9/1/95	Filed order (Dorothy W. Nelson, Stephen R. Reinhardt, Melvin Brunetti): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected
11/30/95	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 95-809; filed on 11/24/95

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals,	Case No. 92-800 SVW (GHKx)
Plaintiff,	COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF [CLASS ACTION]
vs.	
LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FUHRMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L.J. BARNARD; R.W. BERRY; P.N. BRAUNAGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT, and DOES 1 THROUGH 50,	DEMAND FOR JURY TRIAL
Defendants.	

NATURE OF THE ACTION

1. This is a class action brought by PAUL L. SPINK (hereafter "Spink" or "plaintiff") against LOCKHEED CORPORATION and various divisions, departments, affiliates and/or subsidiaries thereof, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"), and related defendants, pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*

2. Spink brings claims under ERISA for himself and on behalf of similarly situated persons to enforce the terms of Lockheed's pension plan, to redress violations of the provisions of ERISA, and to remedy breaches of fiduciary duty by the plan administrators. Under ERISA, Spink alleges that defendants have violated and continue to violate ERISA by denying full pension benefits to him and a class of similarly situated persons because of their age, and by breaching their fiduciary duties to Spink and the plaintiff class by using millions of dollars of pension plan funds to obtain a release of various employment related claims of employees against the plan sponsor concurrently with the massive layoff of the plan sponsor's employees, all to the benefit of Lockheed, not the Plan.

3. Spink brings claims under the ADEA for himself and on behalf of similarly situated persons to obtain monetary, declaratory and injunctive relief to redress defendants' failure to provide full pension benefits to him and class members because of their age.

4. For himself alone, Spink also asserts a common law claim for promissory estoppel and an individual ERISA claim alleging that Lockheed breached the terms of the pension plan and, thus, ERISA by failing to consider all his years of service with Lockheed to determine his eligibility to participate in and the amount of his benefits under the pension plan.

JURISDICTION AND VENUE

5. Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1337, and 29 U.S.C. §§ 626, 1132. This is an action arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* Declaratory relief is sought under 28 U.S.C. §§ 2201(a) and 2202. This Court has pendent jurisdiction over Spink's state claims because they arise out of the same nucleus of common facts on which Spink's ERISA and ADEA claims are based.

6. Venue is proper under 29 U.S.C. § 626 and § 1132 because the violations of ERISA and the unlawful employment practices alleged in this complaint took place in this judicial district and/or the defendants reside and/or do business in this judicial district.

FACTS COMMON TO ALL CAUSES OF ACTION

7. Plaintiff has served or will serve copies of the original complaint on the Secretary of Labor and the Secretary of the Treasury as required by 29 U.S.C. § 1132(h).

8. Plaintiff Paul L. Spink ("Spink") was, during periods of time from in or about 1939 through June 30, 1990, an employee of various divisions, departments, affiliates, and/or subsidiaries of defendant Lockheed Corporation. Plaintiff is a participant in the Lockheed Retirement Plan For Certain Salaried

Employees ("Plan"), within the meaning of Section 3(7) of ERISA, 29 U.S.C. § 1002(7), and is currently receiving benefits from the Plan.

9. Defendant Lockheed Corporation is a Delaware corporation doing business as an aerospace manufacturer in the State of California and throughout the United States, under its own name and under the name of its various divisions, departments, affiliates and/or subsidiaries, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"). Lockheed is an "employer" engaged in commerce and is the Plan Sponsor, as that term is used in ERISA, and is an "employer" within the meaning of and subject to the provisions of the ADEA. As the Plan Sponsor, Lockheed was responsible for the appointment and retention of individuals to the Retirement Plan committee to administer the Plan, among other things. In addition, Defendant Lockheed was responsible at all material times for interpreting and implementing the terms of the Plan, including ensuring the Plan complied with all applicable federal and state laws. Defendant Lockheed had actual control of Plan assets. Therefore, Defendant Lockheed was at all material times a "fiduciary" within the meaning of Section 3(21) (A) of ERISA, 29 U.S.C. § 1002 (21) (A). Defendant Lockheed is also a "party in interest" within the meaning of Section 3(14) of ERISA, 29 U.S.C. § 1002(14).

10. Defendant Daniel M. Tellep ("Tellep") was at all material times Chairperson of the Board and Chief Executive Officer of Defendant Lockheed. Tellep was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14) and 1002(21) (A) with respect to the Plan.

11. Defendant Robert A. Fuhrman ("Fuhrman") was at all material times through April 1, 1990, Vice Chairperson of the Board and Chief Operating Officer of Defendant Lockheed. Fuhrman was at all material times through April 1, 1990, a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14)and 1002 (21) (A) with respect to the Plan.

12. Defendant Vincent N. Marafino ("Marafino") was at all material times Chairperson of the Board and Chief Financial and Administrative Officer of Defendant Lockheed. Marafino was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14) and 1002 (21) (A) with respect to the Plan.

13. Defendant K. H. Anderson ("Anderson") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Anderson was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

14. Defendant L. J. Barnard ("Barnard") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Barnard was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

15. Defendant R. W. Berry ("Berry") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. R. W. Berry was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

16. Defendant P. N. Braunagel ("Braunagel") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Braunagel was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

17. Defendant D. L. Bronco ("Bronco") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Bronco was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

18. Defendant R. H. Northcutt ("Northcutt") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Northcutt was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002(21) (A) with respect to the Plan.

19. Defendant W. E. Skowronski ("Skowronski") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Skowronski was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

20. Defendant A. G. Van Shaick ("Van Shaick") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Van Shaick was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

21. Defendant W. T. Vincent ("Vincent") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Vincent was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

22. At all material times, Bankers Trust Company ("Bankers") was the Trustee and Custodian of the assets of the Plan. Bankers holds the assets of the Plan and performs as trustee pursuant to the Plan's Trust Agreement.

23. Spink is ignorant of the true names and capacities of defendants sued as DOES 1 through 50, inclusive, and therefore sues said defendants by such fictitious names. Spink will ask leave of court to amend this complaint to allege their true names and capacities when the same shall have been ascertained. Spink alleges that each of the defendants named as DOES herein was in some manner responsible for the acts and omissions alleged herein, and he will ask leave of this court to amend this complaint to allege such responsibility when the same shall have peen ascertained.

24. The Plan, which has been in effect for many years, was restated effective August 5, 1985, and has been amended from time to time. The Plan is a defined benefit non-contributory plan that covers substantially all salaried employees of the participating companies, which include Defendant Lockheed Corporation, its departments, divisions, affiliates and subsidiaries. Employees who are eligible to participate in the Plan receive benefits upon their retirement, death, or disability in accordance with the terms of the Plan. Upon information and belief, during the relevant period the Plan had in excess of $1 billion surplus of assets above those needed for funding requirements under the Plan.

25. According to the Plan's terms, the Plan is governed by federal law, the Trust Agreement and the Plan document itself.

The Plan is administered by the Retirement Plan Committee ("Committee"), which Committee has the responsibility and legal authority to control the Plan's operation and administration in accordance with the terms of the Plan Document and Trust Agreement, including the exercise of all fiduciary functions provided for in either the Plan Document or the Trust Agreement as are necessary to the Plan's administration and operation. By resolution of its Board of Directors, the plan sponsor, Defendant Lockheed had authority to appoint and/or approve the Committee's membership.

26. The Plan Document and the Trust Agreement for the Plan expressly provide that the Plan's assets shall not be used for or diverted to any other purposes than for the sole and exclusive benefit of Plan participants and beneficiaries.

27. Spink was first employed by Lockheed as a timekeeper and then as a welder from approximately November, 1939, through August, 1941. Spink worked for Lockheed Overseas Corporation from approximately July, 1943 through July, 1944, for Navy Lockheed Service Center from approximately July, 1944 through August, 1945, for Lockheed Aircraft Corporation from approximately August, 1945 through November, 1945, and for Lockheed Aircraft Service, Inc. from approximately November, 1945 through November, 1946. From approximately August, 1947 through August, 1950, Spink was again employed by Lockheed Aircraft Service, Inc. Spink worked for Lockheed California Company beginning in or about May, 1979 through the mid-1980's, and from that time until his retirement on or about June 30, 1990, he was employed by Lockheed Aeronautical Systems Company and/or Lockheed Advanced Development Projects.

CLASS ACTION ALLEGATIONS

28. Spink brings Counts I, II and III pursuant to Rule 23(b) (2) and (3) of the Federal Rules of Civil Procedure on behalf of himself and other persons similarly situated.

29. Under Counts I and II, Spink seeks to represent a class of all persons who:

(a) have had or will have at least one hour of service for Lockheed in any plan year beginning in 1988 or thereafter, and

(b) have been or will be participants or eligible to be participants in the Plan in any plan year beginning in 1988 or thereafter, and

(c) have had or will have their benefits under the Plan calculated under a formula which disregards, because of their attainment of any age, any time of service with Lockheed.

30. Under Count III, Spink seeks to represent a class of all persons who were injured by defendants' breach of their fiduciary duties to the Plan as alleged herein and whose injuries resulted from their waiver of certain rights in order to obtain enhanced benefits under the Special Retirement Opportunity ("SRO") and/or the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990, or from their loss of such benefits because they refused to waive their rights.

31. Joinder of the numerous members of these classes would be impracticable since, on information and belief, it is alleged that the size of each class is in excess of 30 persons.

32. The claims brought on behalf of these classes depend on the resolution of common questions of fact and law affecting all members of the class, including whether defendants have taken the actions alleged and whether the practices, policies and actions alleged herein violate ERISA and the ADEA.

33. Spink's claims are typical of those of the members of the classes he seeks to represent. Spink will fairly and adequately represent the interests of the proposed classes because his claims are identical to those of the members of the classes and because he has secured representation by attorneys who are skilled and knowledgeable in the prosecution of complex employment litigation.

34. Defendants' unlawful actions and/or refusals to act as defendants alleged in this complaint have been taken on grounds generally applicable to all members of the alleged classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole. Further, the questions of law and/or fact common to the members of each class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversies alleged, since the statutory violations alleged and the conduct giving rise to those violations are identical for all class members. The only individual issue which is truly of an individual nature is the question of monetary relief to which each class member is entitled. Since such relief will necessarily be calculated by reference to a common formula imposed by the Court upon resolution of the statutory claims.

COUNT I
VIOLATION OF ERISA'S PROHIBITION OF AGE DISCRIMINATION
29 U.S.C. § 1054(a) (1) and (b) (1) (H) (i)
(Class claim)

35. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

36. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a) (1) (B) and (3) of ERISA, 29 U.S.C. §§ 1132(a) (l) (B) and (3).

37. Spink is informed and believes and, on that basis, alleges that, at or about the time that Spink returned to Lockheed, the terms of the Plan provided that all salaried employees of Lockheed were considered participants or members of the Plan, unless they were 60 years old or older when they first began working for Lockheed.

38. At the time he returned to Lockheed in May, 1979, Spink was 61 years old, his birthdate being October 31, 1917. In or about 1984, Lockheed informed Spink that he would not be considered a participant or member of the Plan because he was over age 60 when he was rehired by Lockheed in 1979.

39. In 1986, the U.S. Congress enacted the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 ("OBRA 1986"), which, *inter alia*, amended ERISA to bar discrimination on the basis of age in the participation and benefit accrual standards applied by employee benefit plans, including but not limited to the Plan for Lockheed employees. As a result, Section 202(a)(2) of ERISA provides, "No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." 29 U.S.C. § 1052 (a) (2).

40. OBRA 1986 also amended Section 204 of ERISA, "Benefit accrual requirements," the relevant part of which currently provides:

> a. **Satisfaction of requirements by pension plans** Each pension plan . . .
>
> (1) in the case of a defined benefit plan, shall satisfy the requirements of section (b)(1) of this section; . . .
>
> b. **Enumeration of plan requirements**
>
> * * *
>
> (1)(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i).

41. Pursuant to OBRA 1986, the Internal Revenue Service ("IRS") published proposed regulations interpreting and applying the above language concerning the proper calculation of benefits under an ERISA retirement benefit plan to the effect that, for a participant who has at least one hour of service for a plan sponsor in plan years beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, *including years of service before 1988*, in determining the participant's plan benefit. Federal Register on April 11, 1988 (53 F.R. 11867). After interagency coordination and consideration of the comments received during their respective comment periods, both the IRS and the Equal Employment Opportunity Commission ("EEOC") noticed their intention to publish final regulations to the above effect, with

respect to the relevant sections of both ERISA and the ADEA. The IRS issued this position in Notice 88-126 (December 9, 1988) which was then published in the Internal Revenue Bulletin on December 27, 1988. 1988-52 I.R.B. The EEOC issued its notice to the same effect at 29 C.F.R. Part 1625, 54 F.R. 604 (January 9, 1989).

42. Under Section 9204 (a) (1) of OBRA 1986, the new benefit accrual provisions "shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply."

43. Plaintiff Spink worked more than one hour for Lockheed in the plan year beginning subsequent to January 1, 1988 as well as in later plan years. At some point, Spink was informed by defendants that they did not intend to credit him with accrued benefits based on his years of service for Lockheed prior to January, 1989.

44. When Spink was so informed, he challenged defendants' position in a number of ways including, but not limited to, by writing a letter, dated June 7, 1990, to defendant Tellep, in Tellep's capacity as Board Chair and Chief Executive Officer of defendant Lockheed, citing, *inter alia*, all of Spink's prior years of service for Lockheed, and directing Tellep's attention to the IRS and EEOC regulations set forth above. Spink also mailed copies of this letter to the other members of Lockheed's Board of Directors.

45. Notwithstanding the clarity of both the IRS and EEOC regulations interpreting the ADEA and ERISA amendments brought about by OBRA 1986, defendant Tellep responded to Spink's letter on behalf of Lockheed, informing Spink that Lockheed would not give Spink or other similarly situated employees who had not been Plan participants prior to the so-called

"effective date" of December 25, 1988, credit for service prior to January, 1989, actually going so far as to state that Lockheed would not give such employees "retirement service credit for periods before an employee became a participant in the plan, *even if participation was previously excluded on account of age.*" (emphasis added). On information and belief, Spink alleges that defendant Tellep sent copies of his letter, dated June 20, 1990, to the other members of Lockheed's Board of Directors.

46. Defendants' policy or practice of denying full accrued benefits to Spink as more fully set forth in Paragraphs 43 through 45, above, constitutes a violation of Sections 202 (a) (2) and 204 (a)(1) and (b)(1)(H)(i) of ERISA, 29 U.S.C. §§ 1052(a) (2) and 1054 (a)(1) and (b)(1)(H)(i). Upon information and belief, Spink asserts that defendants have consistently maintained and applied and will continue to maintain and apply this policy or practice to deny accrued benefits not only to Spink but other similarly situated persons all in violation of Sections 202 and 204 of ERISA as set forth more fully above.

47. As a direct and proximate result of defendants' conduct as alleged herein, Spink and those persons similarly situated have lost and will continue to lose Plan benefits to which they are entitled, and have lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Unless and until this court enjoins defendants' discriminatory conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink and to the plaintiff class, who have no adequate remedy at law. Further, relief by damages alone for defendants' continuing discriminatory practices would require a multiplicity of suits.

COUNT II
VIOLATION OF AGE DISCRIMINATION IN EMPLOYMENT ACT
29 U.S.C. SECTION 623
(Class claim)

48. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, and Paragraphs 37 through 45, all inclusive, as though fully set forth herein.

49. OBRA 1986 amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621, *et seq.*, to bar discrimination on the basis of age in the participation and benefit accrual standards applied by employee benefit plans, including but not limited to the Plan for Lockheed employees. Section 4(j)(1)(A) of the ADEA, 29 U.S.C. § 623(j)(1)(A), now provides that it is unlawful for an employer

> to establish or maintain an employee pension benefit plan which requires or permits--
>
> (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age.

50. Lockheed's policy or practice of denying full accrued benefits to Spink as more fully set forth above, constitutes a violation of Section 4(j) (1) (A) of the ADEA, 29 U.S.C. § 623(j)(l)(A). Upon information and belief, Spink asserts that Lockheed has consistently maintained and applied and will continue to maintain and apply this policy or practice to deny accrued benefits not only to Spink but other similarly situated persons all in violation of Section 4 of the ADEA.

51. As a direct and proximate result of Lockheed's unlawful conduct as alleged herein, Spink and those persons

similarly situated have lost and will continue to lose Plan benefits to which they are entitled, and have lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Spink and members of the class he represents are entitled under Section 7(b) of the ADEA, 29 U.S.C. § 626(b), to be made whole for all losses flowing from Lockheed's discriminatory conduct.

52. On or about February 6, 1990, Spink filed a charge of discrimination with the EEOC. On or about March 29, 1991, the EEOC issued a determination finding that the evidence obtained during the investigation established that Lockheed had violated Spink's right under the ADEA, because OBRA 1986 "provides that no year of service (including years of service before 1988) may be disregarded because of age in determining a participant's benefit under a defined benefit [plan] for plan years beginning after 1987." The Letter of Determination also invited Lockheed and Spink to enter into conciliation efforts and notified the parties that the statute of limitations for bringing a lawsuit would be tolled beginning on March 29, 1991, for a period of up to one year for conciliation.

53. In the face of the proposed final regulations promulgated by the IRS and the EEOC and the March 29, 1991 Determination of the EEOC -- all of which clearly demonstrate that Lockheed's policy and/or practice of denying full accrued benefits to Spink and similarly situated individuals violates the ADEA -- Lockheed has failed and refused to alter its unlawful policy or practice and has also failed and refused to provide Spink and similarly situated individuals with the full benefits to which they are entitled. Because Lockheed has known and now knows that its policy or practice violates the ADEA and/or has shown a reckless disregard for the matter of whether its policy or practice violates the ADEA, Lockheed's conduct as alleged herein is willful within

the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b). Thus, in addition to the losses alleged in Paragraph 51, above, Spink and each member of the class is entitled to receive liquidated damages in an amount equal to his or her losses resulting from the discrimination.

54. Unless and until this court enjoins defendants' discriminatory conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink and to the plaintiff class, who have no adequate remedy at law. Further, relief by damages alone for defendants' continuing discriminatory practices would require a multiplicity of suits.

COUNT III
BREACH OF FIDUCIARY DUTY UNDER ERISA SECTION 404 AND 406 OF ERISA, 29 U.S.C. §§ 1104 AND 1106
(Class Claim)

55. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

56. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a)(2) and (3), 29 U.S.C. §§ 1132(a) (2) and (3).

57. In 1989 and early 1990, Lockheed's management engaged in a contest for control of the corporation with Harold Simmons and NL Industries, Inc. ("Simmons/NLI"), which resulted ultimately in both Lockheed and Simmons/NLI spending hundreds of millions of dollar in a takeover battle and an attendant proxy fight. During this struggle for the corporate control of Lockheed, among other misconduct, Lockheed management and Plan fiduciaries manipulated various Plan assets for their own benefit and for the benefit of Lockheed in violation of their duties under the Plan Document, Trust Agreement and ERISA not to use

or divert Plan assets for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries. Such actions were taken with the knowledge and consent of defendant Lockheed in violation of its duties as Plan Sponsor to see that Plan assets are used solely in the interests of Plan participants and their beneficiaries.

58. After a lengthy and heated battle and in response to continued fears of takeover efforts by Simmons/NLI, defendant Lockheed undertook a major reorganization at its Board of Directors meeting on or about May 8, 1990, allegedly in an effort to make its aeronautical systems business more competitive and profitable by streamlining its operations. One portion of this streamlining involved consolidating the company's Southern California operations in Georgia, which move involved nearly total elimination of defendant Lockheed's Burbank facilities over the next several years. At the time of the May Board meeting, defendant Lockheed estimated that close to 3000 employees, most of whom were then located at the Burbank facility, would be laid off by late June, 1990.

59. In order to carry out these plans, defendant Lockheed passed Plan amendments at the May 8 Board of Directors meeting, which amendments provided for a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"). These options were then made available to certain groups of individuals until June 30, 1990. To be eligible, a Lockheed employee had to hold a salaried position within one of the relevant groups and be on the active payroll or on leave between May 8 and June 30, 1990.

60. The SRO and VRP options offered eligible employees incentives in the form of increased benefits upon retirement to take certain specified employment-related actions. Except for certain identified individuals whose continued employment was deemed important in meeting defendant

Lockheed's operational requirements, virtually all persons eligible for normal or early retirement under the existing Plan were given opportunities to participate in the SRO and VRP. However, in exchange for the exercise of this early retirement option, the eligible employee/participant was required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims. Additionally, the company required eligible employees and participants to indemnify and hold defendant Lockheed harmless from all loss or damage, including attorney's fees, arising out of the breach of any release. The benefits paid under the SRO and VRP were and continue to be funded almost entirely by surplus Plan assets, assets which are currently held in trust for the sole and exclusive benefit of the Plan's participants and beneficiaries. Thus, the Plan's assets were used at least in part by defendant Lockheed to relieve itself of various liabilities or potential liabilities to thousands of its employees.

61. Defendants Lockheed, Tellep, Fuhrman and Marafino violated ERISA by adopting the May 8, 1990 amendments which provided for the SRO and VRP options in that this action misused Plan assets by manipulating those assets for the benefit of defendant Lockheed. Defendant Lockheed failed to discharge its duties as Plan Sponsor solely in the interest of participants and their beneficiaries in violation of the provisions of the Plan, ~~Trust~~ Agreement, and ERISA, all of which prohibit the use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries.

62. Defendants Anderson, Barnard, Berry, Braunagel, Bronco, Northcutt, Skowronski, Van Shaick, and Vincent knew or should have known that the SRO and VRP options adopted as Plan

amendments on May 8, 1990, constituted a use of Plan assets for Defendant Lockheed. Said individual defendants were required to act so as to promptly terminate the misuse of surplus Plan assets by Defendant Lockheed but failed to do so. Instead, acting as Plan fiduciaries, said individual defendants implemented these Plan amendments by requiring participants to execute Settlement Agreements and Releases of claims against Defendant Lockheed to obtain the SRO and VRP benefits outlined above.

63. Each of the defendants, who participated in adopting, or were acting as fiduciaries with respect to the Plan in implementing the SRO and VRP amendments to the Plan, which misused surplus Plan assets by manipulating those assets for the benefit of Defendant Lockheed, violated ERISA in the following respects:

a. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan and by failing to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries in violation of ERISA § 404 (a) (l), 29 U.S.C. § 1104 (a) (1);

b. By failing to discharge their duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries with the care, skill, prudence and diligence under circumstances that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise with the character and aims like those of the Plan in violation of ERISA § 404(a)(l)(B), 29 U.S.C. § 1104 (a) (1)(B);

c. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries in violation of the Provisions in the Plan and Trust Agreement prohibiting use or diversion of any

Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D); and

d. By causing the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of the Plan for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106 (a) and (b).

64. Defendants Lockheed, Tellep, Fuhrman and Marafino, by virtue of their status as a parties in interest and/or fiduciaries with respect to the Plan under ERISA, Sections 3(14) (21)(A), 29 U.S.C. 1002(14)(21)(A), and any other of the defendants who are found liable for breaches of duty during their tenure as Plan fiduciaries, are personally liable to make restitution to the Plan for the value of the use of Plan assets resulting from any such breach and to restore to the Plan any profits which they made through the use of Plan assets, and are subject to any such other equitable or remedial relief as this Court deems appropriate, all in accordance with ERISA, Sections 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a) (2) and (3), as well as pursuant to the Plan document and Trust Agreement.

COUNT IV
ERISA–FAILURE TO FOLLOW TERMS OF PLAN SECTION 502 (a)(1)(B) OF ERISA, 29 U.S.C. § 1132(a)(1)(B)
(Individual Claim)

65. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, and Paragraphs 37 through 45, all inclusive, as though fully set forth herein.

66. Spink brings this claim Section 502(a) (1) (B), 29 U.S.C. § 1132 (a)(1)(B), to recover benefits due to him under the terms of the Plan, to enforce his rights under the terms of the Plan, and to clarify his right to future benefits under the terms of the plan.

67. Upon information and belief, the version of the Plan in effect in 1979 provided that Lockheed employees would become participants in the Plan if they were less than 60 years old when they first began working for Lockheed. Spink was 22 years old when he first was hired by Lockheed in 1939.

68. In or about 1984, Lockheed informed Spink that he would not be considered a participant or member of the Plan because he was over age 60 when he was rehired by Lockheed in 1979. In response, Spink inquired as to whether this was, in fact, Lockheed's position regarding how the Plan applied to Spink and challenged Lockheed's position as unfair and, given his prior service to Lockheed beginning in or about 1939, contrary to the terms of the Plan. Lockheed denied Spink's request for membership in and prospective benefits from the Plan, making clear that Lockheed would maintain its position that Spink was not eligible to participate in the Plan because of his age at the time of his rehire in 1979, and that any of Spink's years of service with Lockheed would not be considered in determining his eligibility to participate in the Plan or the calculation and/or accrual of any benefits due him under the Plan.

69. Defendants have breached and continue to breach the terms of the Plan, thereby violating ERISA, by failing and refusing to consider Spink's pre-1979 years of service with Lockheed in determining whether he was eligible to be a participant in the Plan as of his rehire in 1979 and in calculating the benefits to which he is entitled under the Plan.

70. As a direct and proximate result of defendants' conduct as alleged herein, Spink has lost and will continue to lose Plan benefits to which he is entitled, and has lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Unless and until this court enjoins defendants' unlawful conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink, who has no adequate remedy at law. Further, relief by damages alone for defendants' continuing unlawful practices would require a multiplicity of suits.

COUNT V
Promissory Estoppel

71. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, Paragraphs 37 through 45, and Paragraphs 67 through 69, all inclusive, as though fully set forth herein.

72. Prior to the time he returned to Lockheed in 1979, Spink was employed by Hughes Helicopters, and he is informed and believes that he was due to receive pension benefits from Hughes so long as he continued working for the company through at least October 31, 1982. In offering to employ Spink in 1979, Lockheed, through its authorized agent or employee, represented to Spink that if he accepted employment with Lockheed, Spink would be a participant in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. In reliance upon this representation, Spink left his employment with Hughes to work for Lockheed, thereby relinquishing his membership in Hughes's retirement plan.

73. At or about the time of Spink's return to Lockheed in 1979, and continuing through approximately 1983, Lockheed made representations to Spink that he was and would continue to be during his employment with Lockheed a participant in the Plan, and that he was accruing and would continue to accrue credited service toward retirement benefits under the Plan.

74. As a direct and proximate result of Lockheed's conduct as alleged herein, Spink has lost and will continue to lose Plan benefits to which he is entitled, and has lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by SRO and/or VRP which were provided in or about May, 1990.

75. So as to ensure the Plan's future compliance with defendants' representations to Spink, Spink seeks to have the Court order specific enforcement of the terms of his contract with Lockheed to the effect that he has been a participant of the Plan since at least his rehire in 1979 and that his current and future benefits shall be calculated accordingly.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment for him and the class members he represents, granting the following relief:

1. A order declaring defendant's policy or practice of denying, on the basis of age, full benefits to Spink and the class he represents, as described more fully above, to be a violation of ERISA and the ADEA, and entering a preliminary and permanent injunction barring defendants from maintaining and/or applying said policy or practice.

2. An order voiding all settlement agreements and releases required by the Plan amendments of May 8, 1990, and

signed by Lockheed employees in order to receive benefits under the SRO and VRP options offered pursuant to those amendments.

3. An order providing that all eligible participants in the Plan, who earlier chose not to avail themselves of the SRO or VRP, be given notice of the opportunity and right to now so elect to exercise those options without surrendering any rights they might otherwise have to make claims against defendant Lockheed, with retroactive benefits where applicable, all at the expense of those defendants who are found to have violated their fiduciary duties to the Plan.

4. An order requiring restitution by defendants to the Plan of the value of their use of surplus Plan assets to the extent of the value of their use of such assets, and irrevocably transferring said amount to the Plan (*i.e.*, prohibiting its reversion to the Plan Sponsor) for the exclusive benefit of the Plan's participants and beneficiaries.

5. An order requiring defendants, and each of them, to personally restore to the Plan all profits made by them through the use of Plan assets.

6. An order declaring that Spink is entitled to have his eligibility to participate in and his benefits under the Plan to be determined by reference to all of his years of service with the Plan, including but not limited to those years prior to 1979, and enjoining defendants from failing or refusing to do so.

7. Specific enforcement of the contract which arose between Lockheed and Spink upon his rehire in 1979, as is more fully set forth above.

8. An award of monetary damages to restore Spink and all affected class members to the position which they would have held but for the defendants' contractual and statutory violations as alleged herein.

9. A liquidated damages award equal to their monetary losses for Spink and each class member whose rights under the ADEA were violated by Lockheed's willful conduct as alleged herein.

10. An award of attorneys' fees, litigation expenses, prejudgment interest, and any other appropriate relief.

Dated: February 5, 1992

Respectfully submitted,

TRABER & VOORHEES

By/s/Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs

DEMAND FOR A JURY TRIAL

Plaintiff Paul L. Spink hereby demands for himself and for the class of similarly situated individuals that the ADEA claims and Spink's common law claim of promissory estoppel.

Dated: February 5, 1992

Respectfully Submitted,

TRABER & VOORHEES

By/s/Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly individuals,	CASE NO. CV 92 0800 SVW (GHKx)
Plaintiffs,	NOTICE OF MOTION AND MOTION OF DEFENDANTS TO DISMISS COMPLAINT (Fed. R. Civ. P. 12(b)(6))
v.	
LOCKHEED CORPORATION, et al.,	Hearing Date: April 27, 1992 Time: 1:30 p.m. Courtroom: No. 6
Defendants.	

PLEASE TAKE NOTICE that on Monday, April 27, 1992, at 1:30 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Stephen V. Wilson, District Judge, at the United States Courthouse, 312 North Spring Street, Los Angeles, California, defendants Lockheed Corporation, Daniel M.

Tellep, Robert A. Fuhrman, Vincent N. Marafino, K. H. Anderson, L. J. Barnard, R. W. Berry, P. N. Braunagel, D. L. Bronco, R. H. Northcutt, W. E. Skowronski, A. G. Van Shaick, and W. T. Vincent will move and hereby do move this Court to dismiss the Complaint herein. This motion is made, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the Complaint fails to state a claim upon which relief can be granted.

The motion is based on plaintiffs' Complaint, plan documents and correspondence referenced in the Complaint which are attached as exhibits to the Declarations of Robert G. Kropf and Gordon E. Krischer in support of defendants' motion to dismiss the Complaint, filed concurrently herewith, and on defendants' Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss the Complaint.

DATED: April 1, 1992.

Respectfully submitted,

O'MELVENY & MYERS
GORDON E. KRISCHER
DAVID E. GORDON
PAUL BORDEN

By/s/Gordon E. Krischer
Gordon E. Krischer
Attorneys for Defendants
Lockheed Corporation, et al.

[Declaration of Service omitted in printing]

LOCKHEED'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT LOCKHEED CORPORATION (EXCERPT FROM EXHIBIT B TO GORDON E. KRISCHER'S DECLARATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS)

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Attorneys for Defendants
LOCKHEED CORPORATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. LOCKHEED CORPORATION, et al., Defendants.	Case No. CV 92 0800 SVW (GHKX) LOCKHEED'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT LOCKHEED CORPORATION

PROPOUNDING PARTY: PLAINTIFF PAUL SPINK
RESPONDING PARTY: DEFENDANT LOCKHEED CORPORATION
SET NO.: ONE

Defendant Lockheed Corporation ("Lockheed") hereby responds to plaintiff's first set of requests for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure. In its response, Lockheed incorporates by reference the definitions set forth in Section I of plaintiff's first set of requests for admissions as though fully set forth herein.

REQUEST NO. 1:

ADMIT OR DENY that the document attached as Exhibit A hereto sets forth the manner in which plaintiff's benefits are calculated under the Plan.

RESPONSE TO REQUEST NO. 1:

Lockheed admits that the document attached as Exhibit A hereto sets forth the manner in which plaintiff Paul Spink's benefits are calculated under the Plan.

* * * *

Dated: March 31, 1992.

Respectfully submitted,

O'MELVENY & MYERS
GORDON E. KRISCHER

By/s/Gordon E. Krischer
Gordon E. Krischer
Attorneys for Defendant
Lockheed Corporation

[Declaration of Service omitted in printing]

LETTER FROM TELLEP TO SPINK (EXHIBIT A TO LOCKHEED'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS)

LOCKHEED CORPORATION
4500 Park Granada Boulevard
Calabasas, California 91399
(818) 712-2610

Dan Tellep
Chairman of the Board
and Chief Executive Officer
June 20, 1990

Mr. Paul Spink
4624 El Reposo Drive
Los Angeles, California 90065

I have received your letter of June 7, 1990, and your comments on recent changes in the rules and regulations governing defined benefit pension plans and their impact on your benefit entitlement under Lockheed's retirement plan. You are obviously well informed on the issues and I appreciate the opportunity to clarify the matter.

On May 14, 1979, when you came to work at Lockheed, the retirement plan provisions precluded eligibility for employees hired after the age of 60. This policy was adopted since the regulations at that time required the granting of a retirement benefit upon the attainment of age 65. It did not seem fair to us that a person could be hired over 60 years of age and work for a very short time and receive a benefit.

Subsequently, the Omnibus Reconciliation Act (OBRA) and the Tax Reform Act of 1986 (TRA 86), and corresponding regulations required changes in the retirement plan provisions regarding credited service and plan participation. One change dealt with current plan participants who were over age 65. Under the new regulations effective December 25, 1988, active employees who had been plan participants prior to that date would receive retroactive retirement plan credit for their post age 65 service. This required change does not apply in your situation since you

were not a plan participant prior to the effective date. In other words, the new rules do not require retirement service credit for periods before an employee became a participant in the plan, even if participation was previously excluded on account of age. The AARP article you enclosed with your letter ignores this particular aspect of the new regulations.

Another required change dealt with plan participation and directly applies to your situation. Effective December 25, 1988, the regulations require the commencement of plan participation for active employees previously excluded from participating because of the attainment of a certain age. Additionally, the regulations require the accrual of credited service from the effective date forward and the recognition of all prior service for vesting purposes under the plan. The change provided that a person hired over age 60 could earn a retirement benefit provided that employment period was long enough.

Since age 65 did not automatically result in a benefit, we began to give credited service for years worked after December 25, 1988. While credited service was not made retroactive, all service prior to December 25, 1988, would be counted to determine if the employee worked long enough to earn a benefit. Consequently, all of your Lockheed service is recognized for plan vesting, but only your service after December 25, 1988, is recognized for benefit determination. In other words, you are now a participant in a benefit plan that you had no expectation of participating in at the time of your hire. However, the benefit from the plan is not as great as it could be if all your service was included.

To summarize, the new rules and regulations have established requirements that are different for employees who were previous plan participants than for those who were not. Complying with these regulations, which we have done, surely cannot be viewed as unethical. The rules and regulations that govern the retirement plan are not of Lockheed's making. Whether or not

those regulations are arbitrary is not within our control. The regulations set forth standards under which the plan must be administered, and on that score, we are totally compliant.

On the matter of the 44 months of service reflected on your 1982 Employee Benefit Statement, I can offer no explanation other than it was an error. It was discovered after your 1982 Statement was issued and that is why your 1983 Statement reflected no retirement service. The credited service on your 1989 Statement is correct and will continue to increase, as will your retirement benefit until such time as you elect to have your benefit payments commence.

You have also questioned why $12,300 in life insurance was not reflected on your 1989 Statement. Actually, the $12,300 you refer to is not life insurance but a death benefit provided from the retirement plan. It is based on a percentage of the group term life insurance you have as an active employee. The death benefit from the retirement plan has never been included on the Employee Benefit Statement. In your case, you have $123,000 term life insurance as an active employee. Your term life insurance is properly reflected on your 1989 Statement.

Thank you for providing an opportunity to clarify some of the very complex provisions of the Lockheed Retirement Plan. If you have any further questions on the technical aspects of the Plan, please contact Mr. Chuck Fiore, Manager of Employee Benefits, at (818) 712-2406.

I appreciate your interest and your years of service to Lockheed.

Sincerely,

/s/ Dan Tellep

cc: Lockheed Board of Directors

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. LOCKHEED CORPORATION, et al., Defendants.	Case No. CV 92 0800 SVW (GHKX) DECLARATION OF ROBERT G. KROPF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT (Fed. R. Civ. P. 12(b)(6)) Hearing Date: April 27, 1992 Time: 1:30 p.m. Courtroom: No. 6

I, ROBERT G. KROPF, declare and state as follows:

1. I have been employed at Lockheed Corporation ("Lockheed") since 1978. My position at Lockheed is Corporate Retirement Plan Manager.

2. In that capacity, I am familiar with the documents attached to this Declaration as Exhibits A, B, and C. Based on my own knowledge, I could testify that:

A. Exhibit A is a true and correct copy of the Lockheed Retirement Plan for Certain Salaried Employees (as amended December 17, 1990), which incorporates revisions made to the Plan to comply with the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509) and, at Sections 15.02 and 15.03 (pages 183 through 194), the provisions of the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program;

B. Exhibit B is a true and correct copy of the Lockheed Retirement Plan for Certain Salaried Employees that was in effect in May, 1979; and

C. Exhibit C is a true and correct copy of a Certified Copy of Resolutions adopting the 1990 Special Retirement Opportunity, which includes the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 1st day of April, 1992, at Calabasas, Los Angeles County, California.

<u>/s/ Robert G. Kropf</u>
ROBERT G. KROPF

RELEVANT PROVISIONS OF THE LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED EMPLOYEES, AS AMENDED DECEMBER 17, 1990 (EXCERPTS FROM EXHIBIT A TO DECLARATION OF ROBERT G. KROPF)

LOCKHEED RETIREMENT PLAN
FOR CERTAIN SALARIED EMPLOYEES
(as Amended December 17, 1990)

* * * *

<u>SECTION 1.01</u> - "<u>Administrator of the Plan</u>" shall mean the Retirement Plan Committee or such other person duly appointed by resolution adopted by the Board of Directors.

* * * *

<u>SECTION 1.10</u> - "<u>Credited Service</u>" shall mean the sum of "Past Service" and "Future Service", as those terms are defined in Sections 4.03 and 4.04.

* * * *

<u>SECTION 1.11</u> - "<u>Employee</u>" shall mean a person employed by one or more of the Corporations.

* * * *

<u>SECTION 1.14</u> - "<u>Hour of Service</u>", shall mean each hour credited to an Employee pursuant to the following Subsections (A), (B), (C) and (D):

(A) Each hour for which an Employee is paid, or entitled to payment, for the performance of duties for the Corporation or a parent, subsidiary or affiliate thereof during the applicable computation period.

(B) Each hour for which an Employee is paid, or entitled to payment, by the Corporation or a parent, subsidiary or affiliate thereof on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, sick leave, jury duty, military reserve training leave or other paid time off provided that no hours shall be credited under this Subsection (B) on account of payments made or due under a plan maintained solely to comply with applicable workers compensation, unemployment compensation or disability insurance laws or on account of payments made solely to reimburse an Employee for medical or medically related expenses.

(C) Each hour for which back pay, irrespective of mitigation of damages, is awarded or agreed to by the Corporation or a parent, subsidiary or affiliate thereof, provided that no hour for which an Employee was given credit pursuant to Subsection (A), (B) or (D) of this Section shall also be credited to such Employee under the terms of this Subsection (C).

(D) Each hour an Employee in a Covered Group was serving in the Armed Forces provided such Employee was required to be reemployed by the Corporation pursuant to the terms and conditions of 38 U.S.C. §§ 2021, et seq. and further provided such employee was so reemployed. Such Employee shall be credited at the rate of forty-five (45) hours per week during the period he would normally have been scheduled to work in a Covered Group for the Corporation during such period of absence.

* * * *

SECTION 1.16 - "Member" shall mean an Employee who was or is a participant in the Plan pursuant to the terms of Sections 2.01 and 2.02.

* * * *

SECTION 1.20 - "Plan Year" shall mean the twelve (12) month period beginning with a December 25 and ending with the next succeeding December 24.

* * * *

SECTION 1.27 - "Week of Service" shall mean a payroll week (which is a seven (7) consecutive day period) in which an Employee is credited with one (1) or more Hours of Service. With respect to an Employee who is classified as part-time or call-in, a week of service shall be counted for each forty (40) Hours of Service earned under the Plan. All Weeks of Service shall be calculated in a manner consistent with the terms of Sections 2530.200b-2 and 2530.200b-3 of Title 29 of the Code of Federal Regulations.

* * * *

SECTION 1.29 - "Year of Service" shall mean a Plan Year in which an Employee completes twenty-two (22) or more Weeks of Service.

* * * *

SECTION 2.01 Commencement of Membership.

(A) * * * *

(B) After December 24, 1976, an Employee shall become a Member upon being employed in a Covered Group.

(C) Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older. This restriction shall not apply on or after December 25, 1988. An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service.

* * * *

SECTION 4.01 GENERAL.

A Member's eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service. In general, Section 4.02 provides for the crediting of all Years of Service for purposes of determining benefit eligibility; whereas, Section 4.03 and Section 4.04 provide that only periods of actual participation in the Plan are taken into account in calculating the amount of the benefits.

* * * *

SECTION 4.04 Future Service for Benefit Calculation Purposes.

(A) * * * *

(B) Plan Years on or after December 25, 1976. For Plan Years commencing on or after December 25, 1976, Future Service of each Member shall be credited for each Plan Year on the basis of the Member's Weeks of Service in a Covered Group during any such Plan Year and prior to his retirement. Any Plan Year beginning on or after December 25, 1976 in which a Member has forty-five (45) or more Weeks of Service in a Covered Group shall be credited as a full year of Future Service. When a Member's

total Weeks of Service in a Covered Group during a Plan Year are less than forty-five (45), a credit in units of one-twelfth (1/12) years of Future Service shall be given. The number of units of one-twelfth (1/12) years shall be computed as follows:

> Such Member's total Weeks of Service in a Covered Group in such Plan Year shall be divided by three and three-fourths (3-3/4); any fraction of more than one-half (1/2) in such quotient shall be rounded out to the next whole number and any fraction of one-half (1/2) or less shall be dropped.

(C) Post-Normal Retirement Age Service.

(1) A Member who does not have one Hour of Service on or after December 25, 1988 shall not be entitled to Credited Service for employment after such Member attains age sixty-five (65), except that any Member who was permitted to continue in employment past age sixty-five (65) pursuant to Section 5.01(B) prior to January 1, 1979, shall be entitled to accrue Credited Service for employment past age sixty-five (65) up to January 1, 1979, or until attainment of age sixty-eight (68), whichever shall have occurred first.

(2) A Member who has one Hour of Service on or after December 25, 1988 shall be entitled to Credited Service for employment after such Member attains age sixty-five (65), except as provided in Section 2.01(C) or Section 6.01(A). The accrued benefit of a Member who is receiving benefits under this Plan while still an Employee shall be recomputed as of the beginning of each Plan Year following his benefit commencement date. The increase in benefits, if any, since the prior calculation date shall be reduced by the actuarial equivalent of the accumulated

payments to which he was entitled under the single life annuity form since his most recent benefit calculation date.

* * * *

SECTION 5.01 Normal Retirement.

(A) Eligibility Rule. On or after December 25, 1976, any Member who shall have attained Normal Retirement Age shall be entitled to retire and, by Filing With The Committee, receive a monthly Normal Retirement benefit.

(B) Continued Employment. A Member who otherwise meets the requirements for retirement and who continues in full-time employment with the Corporation after attaining age sixty-five (65) shall not be entitled to receive a monthly Normal Retirement Benefit or Deferred Monthly Retirement Benefit while continuing on such full-time employment, but if his employment is on less than a full-time basis he shall be entitled to receive a monthly Normal Retirement Benefit and/or a Deferred Monthly Retirement Benefit, as the case may be, while continuing on his less than full-time employment and such benefits shall not be subject to suspension unless his employment becomes full-time employment. A Member who so continues in less than full-time employment shall not be given further Credited Service for the periods in such less than full-time employment.

SECTION 5.02 Early Retirement.

(A) General Eligibility Rule. On or after December 25, 1976, any Member who has attained age fifty-five (55), but not age sixty-five (65), and who has ten (10) or more Years of Service may retire and, by Filing With The Committee, receive a monthly Early Retirement Benefit in lieu of a monthly Normal Retirement Benefit. For purposes of this paragraph 5.02(A), a Member must File With The Committee within the twelve (12) month period next following such Member's break in Continuous Service.

(B) Special Rule. In the event a Member who has attained age fifty-five (55), but not age sixty-five (65), has less than ten (10) Years of Service, but has completed ten (10) or more years of Continuous Service, such Member, for the sole purpose of meeting the requirement of this Section 5.02, shall be deemed to have met such requirements.

(C) Continued Employment. A Member who retires under the provisions of this Section 5.02 and who continues in less than full-time employment with the Corporation after such early retirement shall be entitled to receive a monthly Early Retirement Benefit while continuing on his less than full-time employment and such benefits shall not be subject to suspension unless his employment becomes full-time employment. A Member who so continues in less than full-time employment shall not be given further Credited Service for the periods in such less than full-time employment.

* * * *

SECTION 13.01 Named Fiduciary. The following persons shall be Named Fiduciaries under the Plan and Trust Agreement, and shall be the only Named Fiduciaries hereunder:

(A) The Trustee. Any Trustee designated hereunder shall be a bank or trust company qualified under the laws of the United States or of any state to operate thereunder as a trustee.

(B) Lockheed Corporation, as Plan Sponsor. Any authority assigned or reserved to the Corporation under the Plan and Trust Agreement shall be exercised by resolution of the Board of Directors. Such a resolution shall become effective with respect to the Trustee upon receipt by the Trustee of a certified copy of such Board of Directors' resolution.

(C) The Retirement Plan Committee, as Administrator of the Plan. The Retirement Plan Committee shall be appointed to

serve as Administrator by resolution duly adopted by the Board of Directors. Whenever a Retirement Plan Committee is so appointed, the Corporation shall advise the Trustee of the name or names of the person or persons so appointed by providing to the Trustee a certified copy of such Board of Directors' resolution, and the Trustee may assume that such person or persons shall continue in office until advised differently in the same manner. Whenever the Trustee must or may act upon the direction or approval of the Retirement Plan Committee, the Trustee may act upon written communication signed by a majority of such Committee, or any agent appointed in writing by a majority of such Committee to act on the Retirement Plan Committee's behalf, and the authority of any such agent shall be deemed to continue until revoked in writing. In such case, the Trustee shall not be responsible for failure to act without such a communication.

SECTION 13.02 Responsibilities of Named Fiduciaries.

Responsibilities shall be allocated among the Named Fiduciaries as follows:

(A) * * * *

(B) Lockheed Corporation shall have the authority and responsibility for (1) the design of the Plan and Trust Agreement, including amendment of the Plan and Trust Agreement; (2) the qualification of the Plan under applicable law; (3) the designation of members of the Retirement Plan Committee; and (4) funding the Plan in accordance with applicable law and determinations of the Retirement Plan Committee.

(C) The Retirement Plan Committee shall have the responsibility, authority, and discretion necessary to control the operation and administration of the Plan in accordance with the terms of the Plan and Trust Agreement, including without limiting the generality of the foregoing, (1) all functions assigned to the

Retirement Plan Committee under the terms of the Trust Agreement; (2) all functions assigned to the Retirement Plan Committee under the terms of the Plan; (3) determination of benefit eligibility and amount and certification thereof to the Trustee; (4) hiring of persons to provide necessary services to the Plan; (5) issuance of directions to the Trustee to pay any fees, taxes, charges or other costs incidental to the operation and management of the Plan; (6) preparation and filing of all reports required to be filed by the Plan with any agency of Government; (7) compliance with all disclosure requirements imposed by state or federal law; (8) establishment of a funding policy within the meaning of Section 402(b)(1) of the Employee Retirement Income Security Act of 1974; (9) establishment and maintenance of a funding standard account within the meaning of Section 412(b) of the Internal Revenue Code; (10) the determination of the amounts needed to fund the Plan, and the payment of such amounts from Corporate funds to the Trustee; (11) maintenance of all records of the Plan other than those maintained by the Trustee; (12) interpretation and construction of Plan provisions; (13) establishment of procedures to be followed by Members and Beneficiaries in filing applications for benefits; (14) the appointment, removal and replacement of the Trustee; (15) the appointment, removal and replacement of one or more Investment Managers which shall be responsible for the management of such of the assets of the Trust Fund as the Retirement Plan Committee shall specify; and (16) the exercise of all fiduciary functions provided in the Plan or in the Trust Agreement or necessary to the operation of either, except such functions as are specifically assigned to other Named Fiduciaries. The Retirement Plan Committee may adopt such rules to govern its own procedures as it may deem advisable, provided that such rules are not inconsistent with the provisions and purposes of the Plan or Trust Agreement. The Retirement Plan Committee may designate other persons, including the Trustee, to carry out its duties and responsibilities, as it may deem appropriate or necessary. The Retirement Plan Committee shall, no less often than twice a year,

make a report to the Board of Directors of the current status of the operation and administration of the Plan and Trust Fund, which report shall be made in the form and manner determined by the Board of Directors. The Retirement Plan Committee shall periodically review the effect which voluntary withdrawals from the Plan made pursuant to Section 2.03 have on the qualified status of the Plan under applicable provisions of the Internal Revenue Code. In the event the Retirement Plan Committee determines that any further voluntary withdrawals may jeopardize the qualified status of the Plan, the Retirement Plan Committee shall so advise the Board of Directors and shall recommend that the Board of Directors amend the Plan to prohibit further voluntary withdrawals in order to protect the qualified status of the Plan.

SECTION 13.03 Allocation of Responsibilities. Each Named Fiduciary is allocated the individual responsibility for the prudent execution of the functions assigned to him, and none of such responsibilities or other responsibility shall be shared by two or more of such Named Fiduciaries unless such sharing shall be provided by a specific provision of the Plan or Trust Agreement. Whenever one Named Fiduciary is required by the Plan or Trust Agreement to follow the directions of another Named Fiduciary, the two Named Fiduciaries shall not be deemed to have been assigned a shared responsibility, but the responsibility of the Named Fiduciary giving the directions shall be deemed his sole responsibility, and the responsibility of the Named Fiduciary receiving those directions shall be to follow them insofar as such instructions are on their face proper under applicable law.

* * * *

SECTION 14.01 Amendment of Plan. The Corporation reserves the right to amend, modify, suspend or terminate the Plan by action of the Board of Directors. Except as provided in Section 12.03, no such action shall operate to recapture for the Corporation any contributions or payments previously made to any Trustee or

insurance company under the Plan, nor, except to the extent necessary to meet the requirements of the Commissioner of Internal Revenue or any other governmental authority, to adversely affect the benefits of Members already retired or the Retirement Fund then securing such benefits or the benefits of any Member under the provisions of Subsection (C)(3) of Section 5.03.

* * * *

SECTION 15.02 1990 Special Retirement Program.

(A) General. The provisions of this Section 15.02 set forth the terms of the "1990 Special Retirement Program" (the "Program"), insofar as the Program provides increased benefits under this Plan. This Program is available only to certain employees of the following entities (each of which is referred to below as an "Employing Company"): (1) The Lockheed Aeronautical Systems Company division of Lockheed Corporation ("LASC"), as such division existed on May 7, 1990; (2) Lockheed Western Export Company; (3) Lockheed Georgia International Services, Inc.; (4) Lockheed Corporation (International) S.A.; and (5) Lockheed International (GmbH).

(B) Eligibility for Benefits. To be eligible for the benefits described in Section 15.02(C), a Member must meet all of the following requirements:

(1) The Member must be a salaried Employee of an Employing Company who

(i) on or after May 8, 1990 was on the Employing Company's payroll (or on an approved leave of absence),

(ii) if employed by a Company named in paragraph (A)(2), (3), (4) or (5) above, is an

employee who normally reports to LASC in the course of his duties,

(iii) by June 30, 1990 qualifies for early or normal retirement under Section 5.01 or Section 5.02 of the Plan, and

(iv) receives a written layoff notice on or before June 30, 1990.

A Member who meets all of the above requirements is referred to below as an "Eligible Member."

(2) The Eligible Member must voluntarily elect to participate in this Program by executing forms prescribed by the Member's Employing Company and filing them, at the location designated by the Member's Employing Company, no earlier than 9:00 a.m. on May 16, 1990 and no later than 5:00 p.m. on June 30, 1990. Time references refer to the local time for a designated location.

(3) The Employing Company shall File With The Committee documentation stating the names of all Eligible Members who have satisfied conditions (1) and (2) above. The Employing Company shall furnish to each such Eligible Member a written notice of the date on which the Member's employment is scheduled by the Employing Company to end (the Member's "Termination Date"). To be entitled to the additional benefits described in Section 15.02(C), the Member must elect to retire on the Member's Termination Date by Filing With the Committee the forms normally required for such an election.

(4) The Eligible Member must agree (by executing a Settlement Agreement and General Release acceptable to the Eligible Member's Employing Company) to accept benefits under this Program in lieu of pursuing any claims

the Eligible Member may have against the Member's Employing Company or the Corporation arising from termination of employment or otherwise.

(5) The Eligible Member must thereafter actually terminate employment with the Corporation on the Eligible Member's Termination Date, unless the Member's employment is terminated earlier due to accident, illness, disability, or death.

Benefits under the Program are payable only under the circumstances just described. An Eligible Member who becomes entitled to benefits under the Program as a result of meeting all such requirements is referred to in this Section 15.02 as a "Participant". Benefits are not payable under the Program if, for example, an Eligible Member is discharged before the Eligible Member's Termination Date for poor performance or misconduct, as determined in the sole discretion of the Employing Company.

(C) <u>Benefits</u>. A Participant in this Program shall be entitled to the following special benefits:

(1) For purposes of Section 6.01, the Participant will be credited with three additional years of "Future Service" (subject to the forty year limit on Credited Service set forth in such Section). If the Participant is subject to mandatory retirement under the personnel policies of the Participant's Employing Company, the Participant shall not be credited with more Future Service under the preceding sentence than the Participant could have earned had the Participant continued employment until the Participant's mandatory retirement age.

(2) For purposes of Section 6.02, the Participant will be credited with three additional years of Future Service (subject to the forty year limit on Credited Service) and

will be deemed to be three years older than the Participant's chronological age shown on the Corporation's records on the Participant's Termination Date.

(3) Age and service credits granted under Section 15.02(C)(1) or 15.02(C)(2) shall not be taken into account in determining whether an individual is an Eligible Member.

(4) For purposes of Section 1.02 and 1.03 of the Plan, the Participant will be deemed to have continued to receive pay, for the period of additional Future Service credited under Section 15.02(C)(1), at the Participant's Weekly Rate of Compensation on the Rate Determination Day that last preceded the Participant's Termination Date.

(5) The evidence of good health requirements of Section 7.02(C) shall not apply to preclude the election of an optional annuity form by a Participant.

(D) Rescission of Layoff Notices. If an Employing Company rescinds the layoff notice of an Eligible Member prior to the Member's Termination Date, the individual shall cease to be an Eligible Member who may participate in this Program. However, the individual may then become eligible for the 1990 Voluntary Retirement Program (see Section 15.03).

(E) Date Employment is to End. Each Employing Company shall establish a Termination Date for each Participant it employs. The Participant shall cease to be an Employee on the Participant's Termination Date. A Participant's Termination Date shall normally be on the date on which the Participant's active services are to end, as set forth in the layoff notice issued to the Participant. However, the Employing Company shall have the right to schedule a later Termination Date, but such Date shall be no later than March 31, 1991 unless the Participant consents

otherwise. The Employing Company may postpone a Participant's scheduled Termination Date on at least two weeks notice to the Participant, but not past March 31, 1991 unless the Participant consents otherwise. A Participant's Termination Date may be accelerated by agreement of the Participant and the Employing Company.

(F) Effect of Reemployment on Benefits. The special benefits provided under Section 15.02(C) shall only be payable during the period following a Participant's Termination Date and preceding the Participant's recommencement of full-time employment with the Corporation. Hence, if a Participant is reemployed by the Corporation after the Participant's Termination Date and the Participant's benefits under the Plan are suspended because of reemployment (in accordance with Section 10.06), all special benefits under Section 15.02(C) shall cease and they shall not thereafter recommence even if the Participant's retirement benefits again become payable.

(G) Duration of the Program. This Program is intended to be a temporary program and no one may elect to participate in the Program after 5:00 p.m. (local time) on June 30, 1990.

SECTION 15.03 1990 Voluntary Retirement Program.

(A) General. The provisions of this Section 15.03 set forth the terms of the "1990 Voluntary Retirement Program" (the "Program"), insofar as the Program provides increased benefits under this Plan. This Program is available only to certain employees of the following entities (each of which is referred to below as an "Employing Company"): (1) the Lockheed Aeronautical Systems Company division of Lockheed Corporation ("LASC"), as such division existed on May 7, 1990; (2) Lockheed Western Export Company; (3) Lockheed Georgia International Services, Inc.; (4) Lockheed Corporation (International) S.A.; and (5) Lockheed International (GmbH).

(B) Eligibility for Benefits. To be eligible for the benefits described in Section 15.03(C), a Member must meet all of the following requirements:

(1) The Member must be a salaried Employee of an Employing Company who

(i) on or after May 8, 1990 was on the Employing Company's payroll (or on an approved leave of absence),

(ii) if employed by a Company named in paragraph (A)(2), (3), (4), or (5) above, is an employee who normally reports to LASC in the course of his duties,

(iii) by June 30, 1990 qualifies for early or normal retirement under Section 5.01 or Section 5.02 of the Plan, and

(iv) is not ineligible for the Program.

A Member shall be ineligible if the Member is listed on the schedule attached to this Program. A Member who is notified prior to June 30, 1990 that the Member is being laid off is ineligible for the Program unless the Member's resignation pursuant to the Program was accepted by the Member's Employing Company before the issuance of the layoff notice. Such a Member is referred to below as an "Eligible Member."

(2) The Eligible Member must voluntarily resign by executing forms prescribed by the Member's Employing Company and filing them, at the location designated by the Member's Employing Company, no earlier than 9:00 a.m. on May 16, 1990 and no later than 5:00 p.m. on June 30,

1990. Time references refer to the local time for a designated location.

(3) The Employing Company shall File With The Committee documentation stating the names of all Eligible Members who have satisfied conditions (1) and (2) above. The Employing Company shall furnish to each such Eligible Member a written notice of the date on which the Member's employment is scheduled by the Employing Company to end (the Member's "Termination Date"). To be entitled to the additional benefits described in Section 15.02(C), the Member must elect to retire on the Member's Termination Date by Filing With the Committee the forms normally required for such an election.

(4) The Eligible Member must agree (by executing a Settlement Agreement and General Release acceptable to the Eligible Member's Employing Company) to accept benefits under this Program in lieu of pursuing any claims the Eligible Member may have against the Member's Employing Company or the Corporation arising from termination of employment or otherwise.

(5) The Eligible Member must thereafter actually terminate employment with the Corporation on the Eligible Member's Termination Date, unless the Member's employment is terminated earlier due to accident, illness, disability, or death.

Benefits under the Program are payable only under the circumstances just described. An Eligible Member who becomes entitled to benefits under the Program as a result of meeting all such requirements is referred to in this Section 15.03 as a "Participant". Benefits are not payable under the Program if, for example, an Eligible Member is discharged before the Eligible Member's Termination Date for poor performance or misconduct,

as determined in the sole discretion of the Employing Company, or resigns before such Termination Date, even if the individual has elected to participate in this Program.

(C) Benefits. A Participant in this Program shall be entitled to the following special benefits:

(1) For purposes of Section 6.01, the Participant will be credited with three additional years of "Future Service" (subject to the forty year limit on Credited Service set forth in such Section). If the Participant is subject to mandatory retirement under the personnel policies of the Participant's Employing Company, the Participant shall not be credited with more Future Service under the preceding sentence than the Participant could have earned had the Participant continued employment until the Participant's mandatory retirement age.

(2) For purposes of Section 6.02, the Participant will be credited with three additional years of Future Service (subject to the forty year limit on Credited Service) and will be deemed to be three years older than the Participant's chronological age shown on the Corporation's records on the Participant's Termination Date.

(3) Age and service credits granted under Section 15.03(C)(1) or 15.03(C)(2) shall not be taken into account in determining whether an individual is an Eligible Member.

(4) For purposes of Section 1.02 and 1.03 of the Plan, the Participant will be deemed to have continued to receive pay, for the period of additional Future Service credited under Section 15.03(C)(1), at the Participant's Weekly Rate of Compensation on the Rate Determination Day that last preceded the Participant's Termination Date.

(5) The evidence of good health requirements of Section 7.02(C) shall not apply to preclude the election of an optional annuity form by a Participant.

(D) Date Employment is to End. Each Employing Company shall establish a Termination Date for each Participant it employs. The Participant shall cease to be an Employee on the Participant's Termination Date. A Participant's Termination Date shall normally be no later than June 30, 1990. However, the Employing Company shall have the right to schedule a later Termination Date, but such date shall be no later than March 31, 1991 unless the Participant consents otherwise. The Employing Company may postpone a Participant's scheduled Termination Date on at least two weeks notice to the Participant, but not past March 31, 1991 unless the Participant consents otherwise. A Participant's Termination Date may be accelerated by agreement of the Participant and the Employing Company.

(E) Effect of Reemployment on Benefits. The special benefits provided under Section 15.03(C) shall only be payable during the period following a Participant's Termination Date and preceding the Participant's recommencement of full-time employment with the Corporation. Hence, if a Participant is reemployed by the Corporation after the Participant's Termination Date and the Participant's benefits under the Plan are suspended because of reemployment (in accordance with Section 10.06), all special benefits under Section 15.03(C) shall cease and they shall not thereafter recommence even if the Participant's retirement benefits again become payable.

(F) Duration of the Program. This Program is intended to be a temporary program and no one may elect to participate in the Program after 5:00 p.m. (local time) on June 30, 1990.

* * * *

RELEVANT PROVISIONS OF THE LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED INDIVIDUALS IN EFFECT AS OF MAY 1979 (EXCERPTS FROM EXHIBIT B TO DECLARATION OF ROBERT G. KROPF)

LOCKHEED RETIREMENT PLAN
FOR CERTAIN SALARIED EMPLOYEES
(AS IN EFFECT ON JANUARY 1, 1979)

* * * *

Section 1.16 - "Member" shall mean an Employee who was or is a participant in the Plan pursuant to the terms of Sections 2.01 and 2.02.

* * * *

Section 2.01 Commencement of Membership.

(A) * * * *

(B) * * * *

(C) Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older.

* * * *

LOCKHEED CORPORATION BOARD OF DIRECTORS' CERTIFIED COPY OF RESOLUTIONS ADOPTING THE 1990 SPECIAL RETIREMENT OPPORTUNITY (EXCERPTS FROM EXHIBIT C TO DECLARATION OF ROBERT G. KROPF)

CERTIFIED COPY OF RESOLUTIONS

1990 Special)
Retirement Opportunity)
______________________)

Upon motion duly made by Director Christopher, seconded by Director Ukropina, and unanimously carried by the affirmative vote of all of the Directors present, the preambles and resolutions set forth in Attachment G were adopted.

CERTIFICATION

I, WILLIAM T. VINSON, hereby certify that I am the duly elected and acting Vice President-Secretary of Lockheed Corporation; that the foregoing is a full, true and correct copy of resolutions duly adopted by the Board of Directors of said Corporation, at a meeting thereof duly held at the office of the Corporation in Calabasas, California, at 9:00 a.m., on Tuesday, the 8th day of May, 1990; and that said resolutions have not been rescinded or revoked.

IN WITNESS WHEREOF, I have hereunto signed my name as Vice President-Secretary and affixed the Seal of said Corporation this 6th day of December, 1990.

/s/ William T. Vinson
William T. Vinson
Vice President-Secretary

Attachment G to Minutes of
Meeting of Board of Directors
Held May 8, 1990

1990 Special	)
Retirement Opportunity	)
______________________	)

WHEREAS, this Corporation deems it is desirable to extend special retirement incentives to certain participants in the Lockheed Retirement Plan for Certain Salaried Employees (the "Plan"); and

WHEREAS, a voluntary program offering such incentives has been presented to and considered by this Board;

NOW, THEREFORE, BE IT RESOLVED that the attached 1990 Special Retirement Opportunity ("SRO") be, and hereby is, adopted effective as of the dates set forth therein; and

FURTHER RESOLVED, that each Employing Company, as such term is defined in the SRO, may, on a one-time basis on or before June 25 1990, amend the schedule of employees ineligible for the SRO, but only to delete names therefrom.

LOCKHEED CORPORATION
1990 SPECIAL RETIREMENT OPPORTUNITY

PURPOSE OF THE SRO

Lockheed Corporation has adopted the 1990 Special Retirement Opportunity (SRO) to provide special retirement benefits to certain salaried persons employed by certain of its divisions and subsidiaries. The SRO consists of two separate but similar programs: (1) The 1990 Special Retirement Program, which is available to certain laid off employees; and (2) the 1990 Voluntary Retirement Program, which is available to certain employees who have not been laid off. Each of these separate programs is referred to below as a "Program."

STRUCTURE OF EACH PROGRAM

Each Program consists of special retirement plan provisions and other related provisions. The eligibility provisions of each Program are set forth in full in the retirement plan provisions. These eligibility requirements are incorporated by reference into the other parts of the Program.

* * * *

[Note: Provisions of the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program as adopted by Lockheed Corporation as amendments to the Lockheed Retirement Plan for Certain Salaried Employees by the foregoing resolutions are §§ 15.02 and 15.03 of the Plan, respectively, and are reproduced in this Joint Appendix, <u>supra</u>, at pages 49 through 57, inclusive.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, et al.,

Plaintiffs,

v.

LOCKHEED CORPORATION, et al.,

Defendants.

CASE NO. CV 92-800 SVW (GHKx)

July 31, 1992, Filed and Entered

ORDER GRANTING DEFENDANT LOCKHEED CORPORATION'S MOTION TO DISMISS

I. BACKGROUND

Paul L. Spink, the named Plaintiff, seeks additional pension benefits under the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan") sponsored by the named Defendant, Lockheed Corporation ("Defendant"). Defendant first employed Plaintiff in 1939, and then intermittently through 1950. After an interim of nearly thirty years, Defendant again hired Plaintiff in May 1979. Under the Plan terms in effect at the time of his hire in 1979, Defendant lawfully excluded Plaintiff from participating in the Plan because he was over sixty years old. However, changes in federal law in 1986 compelled Defendant to permit Plaintiff to participate in the Plan beginning on December 25, 1988, the commencement date of the first fiscal Plan year following January 1, 1988. Plaintiff subsequently accrued benefits under the Plan until his retirement in June 1990.

In an effort to attenuate the effects of anticipated layoffs by inducing voluntary retirement, Defendant amended the Plan in 1990 to provide enhanced retirement benefits, allegedly paid out of surplus Plan funds, to participants deemed eligible to take early retirement. Participants choosing this option were required to sign a waiver of employment related claims. Although eligible, Plaintiff did not retire pursuant to this early retirement program.

In this action, Plaintiff alleges the following three claims in his individual capacity, and also on behalf of all similarly situated employees: first, statutory amendments to the federal law governing benefit plans allegedly require Defendant to provide retroactive participation and benefit accrual to all employees, like Plaintiff, who were excluded from Plan participation before 1988 because of age, and who have worked at least one hour in 1988; second, Defendant's 1990 Plan amendment allegedly breached a fiduciary duty in violation of federal law; and third, the same Plan amendment allegedly constituted a federally prohibited transaction because it benefitted Defendant, a party-in-interest. Finally, in a fourth claim brought solely in his individual capacity, Plaintiff alleges that he is personally owed retroactive benefits based on equitable estoppel stemming from Defendant's alleged oral misrepresentations.[1]

On April 2, 1992, Defendant filed this Motion to Dismiss the entire action, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that: the relevant federal law is exclusively prospective regarding plan participation and benefit accrual; amending the Plan did not violate a fiduciary duty because no such duty applied; and, as pleaded, federal law does not allow recovery for alleged oral misrepresentations. The Court held a hearing on April 27, 1992 to consider this motion. Having considered the

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[1] In response to Defendant's Motion to Dismiss, Plaintiff filed an amended opposition on April 17, 1992 withdrawing Count IV, a claim for benefits under the Plan, from his Complaint.

arguments of counsel, both written and oral, the Court GRANTS Defendant's Motion to Dismiss in its entirety because even assuming the truth of Plaintiff's allegations for the purposes of this Motion, Plaintiff fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A. Alleged Violations of ERISA and ADEA

Plaintiff focuses on certain provisions of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat. 1973, that amended the Employee Retirement Income Security Act of 1974 ("ERISA"), ch. 18, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 301-1144), the Age Discrimination in Employment Act ("ADEA"), ch. 14, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34), and the Internal Revenue Code of 1986, 26 U.S.C. Prior to OBRA 1986, none of these statutes prevented an employer from denying participation in its pension plan to employees who were hired after age sixty if the normal retirement age was sixty-five. Indeed, both ERISA and the IRC specifically allowed this practice until OBRA 1986 proscribed it.

In order to accomplish comprehensive reform, OBRA 1986 amended ERISA, the ADEA, and the IRC together. Thus, OBRA 1986 amended the plan participation provisions of both ERISA, 29 U.S.C. § 1052(a), and the IRC, 26 U.S.C. § 410(a)(2), as well as the benefit accrual provisions of ERISA, 29 U.S.C. § 1054(b)(1)(H), the ADEA, 29 U.S.C. § 623(j), and the IRC, 26 U.S.C. § 411(b)(1)(H).

The central legal issue Plaintiff raises under OBRA 1986 concerns the effective dates of the amended provisions of ERISA and the ADEA, rather than their substantive provisions. Plaintiff asserts that the OBRA 1986 amendments entitle him to retroactive Plan participation, and concomitant benefit accrual, for those years

of employment following his hire in 1979 and preceding his initial Plan participation in 1988. Plaintiff's thesis is that Defendant failed to comply with the provisions of amended ERISA -- namely, 29 U.S.C. § 1052(a)(2) -- by not allowing him, once he had worked an hour of service in 1988, to participate retroactively in and, thus, to accrue benefits retroactively under the Plan.

The plain language of OBRA 1986, however, defeats Plaintiff's claim. The court holds that the relevant effective date provisions of the OBRA 1986 amendments to ERISA and the ADEA are *prospective* and thus do not provide Plaintiff the grounds to participate retroactively for periods of service prior to his joining the Plan on December 25, 1988, nor to receive retroactive benefit accrual.

First, as concerns Plan participation, OBRA 1986 § 9203(a) amended ERISA such that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." *See* 29 U.S.C. § 1052(a)(2). However, OBRA 1986 § 9204(b) further states that "[t]he amendments made by section 9203 shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* with respect to service performed on or after such date" (emphasis added). Thus, OBRA 1986 only required Defendant to allow Plaintiff to participate in the Plan beginning December 25, 1988 -- because that date marked the beginning of the first fiscal Plan year following January 1, 1988 -- and not for prior Plan years.

Second, because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual. To this end, the Court holds that one must first be a plan participant before one can enjoy benefit accrual. *See* 29 C.F.R. § 2530.204-1(b)(1) (service before an employee first becomes a plan participant is disregarded for benefit accrual purposes).

Moreover, the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion. In particular, OBRA 1986 §§ 9201 and 9202 amended the benefit accrual language in both ERISA and the ADEA to make unlawful "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's accrual on account of age." However, OBRA 1986 § 9204(a) plainly states that "[t]he amendments made by sections 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). As such, it is apparent that Congress did not intend to retroactively impact benefit accrual provisions prior to January 1, 1988.

Given Congress' intention in this analogous context, Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation. To reiterate, the Court finds Plaintiff's argument unsupported by the unambiguous statutory language. Section 9204(a), which concerns the effective dates of OBRA 1986's participation amendments, plainly states: "The amendments made by section 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). Therefore, because the OBRA 1986 amendments only apply to Plan years beginning on or after January 1, 1988, Plaintiff is entitled neither to participate retroactively nor to accrue benefits retroactively for Plan years before 1988.

B. Alleged Violations Through Plan Amendment

Plaintiff next contends that in amending the Plan in 1990, Defendant breached its fiduciary duty under ERISA. This claim is based on the false assumption that amending the Plan constituted a fiduciary act. Plaintiff correctly observes that a corporate

sponsor must discharge its obligations solely in the interests of the participants and beneficiaries when acting in its role as plan administrator. However, where, as here, a defendant is both an employer *and* an administrator of a pension plan, it is subject to separate and differing responsibilities depending upon the role it is performing. As the Second Circuit has stated: "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (*quoting Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)), *cert. denied*, 474 U.S. 1113 (1986). Therefore, when acting in its corporate capacity, Defendant was obligated to "see that such benefit plans as it [chose] to maintain [were] designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020; *see also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets."), *cert. denied*, 481 U.S. 1016 (1987). As the Third Circuit explained:

> Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan. . . [It is] extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word "administration" encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements.

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161 (3rd Cir. 1990). The Sixth Circuit has similarly reasoned:

> There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second . . . . The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto, 861 F.2d at 911-12 (emphasis added). Finally, the Ninth Circuit similarly differentiates the duties owed in amending a plan from those arising from plan administration. Reflecting this approach, the Ninth Circuit held in *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), that amending a benefit plan so that a corporate sponsor would receive any surplus funds not needed to pay participants did not by itself comprise an ERISA violation, but only constituted "a claim upon which relief may be granted in the context of the complaint's further allegations that the *fiduciaries* misused plan assets." *Id.* (emphasis added). In sum, the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan; whereas, in their role as plan administrator with concomitant fiduciary duties, the same corporate sponsor must act in the sole interest of plan participants and beneficiaries when administering plan provisions.

Here, Defendant was not acting in its role as a plan administrator when it amended the Plan. Rather, amending the Plan to provide enhanced retirement benefits constituted a business judgment that properly resided with corporate officers. Therefore, Defendant's actions can not comprise a breach of the fiduciary duty

owed to the Plan participants because no such fiduciary duty existed. Indeed, the sole fiduciary duty implicated by the amendment was the duty owed to Defendant's stockholders. The Court views the subsequent payment of enhanced benefits to selected participants as merely Defendant's adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, Plaintiff fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions. Further, Plaintiff mistakenly relies on 29 U.S.C. § 1344(d)(1) to argue that only through the process of plan termination does an exception arise to the general principle that benefits must never, more than incidentally, inure to an employer as a party-in-interest. The process of plan termination allows this exception under the *fiduciary* responsibilities arising from plan administration. Hence, Plaintiff's argument is inapposite because the violations alleged arise from the amendment of the Plan and not from the subsequent administration of its terms.

Plaintiff's attempts to distinguish the cases cited above fall far short of the mark.[3] The factual distinctions relied upon are not significant in the cases themselves and are nonexistent in the relevant statutes. In short, Plaintiff offers no authority to support his argument that the distinctions culled are of legal significance.

Plaintiff also asserts that Defendant specifically violated its fiduciary duty in requiring those participants electing to receive enhanced retirement benefits to execute a release of employment related claims. The Court disagrees and finds that this release condition, as embodied in the Plan amendment, was a design feature not subject to the scrutiny of ERISA's fiduciary standards

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[3] [Footnote 2 omitted in original.] Plaintiff urges that the cases are distinguishable because, *inter alia*, they involve welfare rather than pension plans, unfunded or underfunded plans, amendments to terminate a plan, the initial creation and design of a plan, and/or amendments that only benefit the sponsor in an incidental manner.

unless improperly administered. This very type of release provision has been upheld in a case involving an initial plan creation, *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988), and the Court finds no holding, statute, or compelling reason to prohibit its inclusion through the amendment of a continuing plan.[4]

Finally, Plaintiff contends that the doctrine of collateral estoppel precludes Defendant from contesting Plaintiff's fiduciary breach theory in relation to the Plan amendments. Plaintiff alleges that Defendants had a full and fair opportunity to litigate these same Plan amendment issues in a previous motion to dismiss in a similar cause of action. *Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990). The Court rejects this claim because the mere refusal by the prior court to grant the motion to dismiss did not adversely resolve any factual issues against Defendant, nor did it constitute a sufficiently firm or sufficiently final judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

C. Alleged Violations Through Oral Misrepresentation

Plaintiff argues in his final claim that despite the express language of the Plan, he is entitled to additional benefits on account of Defendant's alleged oral misrepresentation of coverage.[5]

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[4] Plaintiff concedes that Defendant would have enjoyed broad discretion in both the establishment and termination of the Plan. The amending of a continuing plan seems similarly legitimate to the Court. Not surprisingly, the case law bears out this intuition. "The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, . . . its actions are not to be judged by fiduciary standards." *Musto*, 861 F.2d at 912 (emphasis added).

[5] Although the basis for this claim is unclear, regardless of whether Plaintiff intended to bring this allegation under ERISA or state common law, ERISA explicitly preempts state laws to the extent that they relate to any employee benefit (continued...)

Defendant responds that ERISA only permits payment of benefits under the written terms of the Plan and no other section of ERISA authorizes recovery on a promissory or equitable estoppel basis.

Plaintiff accurately observes that 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to bring suit against a plan "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." However, the Ninth Circuit has held that recovery must be based upon the terms of the plan and that alleged oral misrepresentations are insufficient under 29 U.S.C. § 1132(a)(1)(B). Basing its analysis on 29 U.S.C. § 1102(a)(1), which requires benefit plans to be maintained pursuant to a written agreement, the Ninth Circuit rejected a suit for additional plan benefits holding that to allow a claim based on estoppel would conflict with the statutory requirement. *Davidian v. So. Calif. Meat Cutters Union & Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988); *see also Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 (9th Cir. 1988). In addition, there is no jurisdictional basis in this case for a claim under § 1132(a)(1)(B) because Plaintiff is not suing the Plan.

Second, although 29 U.S.C. § 1132(a)(2) permits a claim for equitable relief founded on a violation of fiduciary duty, the Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 477 U.S. 134, 142, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985), that any amounts recovered under § 1132(a)(2) must

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[5] (...continued)
plan not exempt from federal regulation. 29 U.S.C. §§ 1144. Further, cases in the Ninth Circuit have consistently held that ERISA preempts state law theories of recovery. *E.g. Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) (holding that ERISA preempts a state law claim based on alleged oral misrepresentation by an employer as to the level of benefits). Therefore, only three statutory grounds, discussed *infra*, survive as conceivable foundations for recovery: 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), and 1132(a)(3).

be paid to a plan, not to an individual participant or beneficiary. In this action, recovery under § 1132(a)(2) is untenable because Plaintiff's oral misrepresentation claim is brought solely in his individual capacity, not on behalf of the Plan.

Finally, while 29 U.S.C. § 1132(a)(3) permits an action for equitable relief to enforce the terms of a plan, the Ninth Circuit has held that a suit for fiduciary breach may only be brought if recovery would inure to the benefit of the plan as a whole and not to individual participants. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991). Again, Plaintiff brings his oral misrepresentation claim in his individual capacity and, thus, § 1132(a)(3) does not apply.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss in its entirety, and DISMISSES Plaintiff's Complaint WITH PREJUDICE for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

DATED: July 31, 1992

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

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Paul L. Spink

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals,	No.: 92-0800 SVW (GHKX)
Plaintiff,	NOTICE OF APPEAL
vs.	[Fed. Rule App. Proc. 3, 4; Local Rule 17]
LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K. H. ANDERSON; L. J. BARNARD; R. W. BERRY; P. N. BRAUNAGEL; D. L. BRONCO; R. H. NORTHCUTT; W. E. SKOWRONSKI; A. G. VAN SHAICK; and W. T. VINCENT,	
Defendants.	

Notice is hereby given that plaintiff Paul L. Spink hereby appeals to the United States Court of Appeals for the Ninth Circuit from this court's Order Granting Defendant Lockheed Corporation's Motion to Dismiss, entered July 31, 1992, and any Judgment which has been or will be entered thereon.

Pursuant of Local Rule 17.1 of the Local Rules of Practice for the United States District Court, Central District of California, plaintiff Paul L. Spink provides the following information regarding the parties and their attorneys:

Parties to the judgment and order appealed from:	Plaintiff PAUL L. SPINK, a class individually and on behalf of similarly-situated individuals; and defendants LOCKHEED CORPORATION, DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K. H. ANDERSON; L. J. BARNARD; R. W. BERRY; P. N. BRAUNAGEL; D. L. BRONCO; R. H. NORTHCUTT; W. E. SKOWRONSKI; A. G. VAN SHAICK; and W. T. VINCENT
Plaintiffs' Attorney:	Theresa M. Traber Bert Voorhees Traber & Voorhees 128 N. Fair Oaks Avenue Suite 204 Pasadena, CA 91103

Defendants' Attorney:	Gordon E. Krischer David E. Gordon Paul Borden O'Melveny & Myers 400 South Hope Street Los Angeles, CA 90071-2899

DATED: August 26, 1992

Respectfully Submitted,

TRABER & VOORHEES

By/s/ Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs
Paul L. Spink, et al.

[Declaration of Service omitted in printing.]

FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUNAGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Argued and Submitted
February 1, 1994 -- Pasadena, California

Filed July 18, 1995

Before: Dorothy W. Nelson, Stephen Reinhardt, and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti

COUNSEL

Theresa M. Traber, Bert Voorhees, Traber & Voorhees, Pasadena, California, for the plaintiff-appellant.

Gordon E. Krischer, David E. Gordon, Paul Borden, O'Melveny & Myers, Los Angeles, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Paul Spink filed a complaint on behalf of himself and similarly situated individuals against Lockheed Corporation and certain individual defendants (collectively "Lockheed"). Spink alleged that Lockheed's retirement plan violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631 *et seq.*, as amended by the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874 (1986). The complaint also included individual claims based on ERISA and the federal common-law doctrine of equitable estoppel. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Spink appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS BELOW

Because we are reviewing a dismissal of Spink's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), we accept as true all the following material allegations of the complaint. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994).

Spink worked for various subsidiaries and divisions of the Lockheed Corporation between 1939 and 1950. In May 1979, Spink again began working for Lockheed at the age of 61. At the time he was rehired, the terms of the Lockheed Corporation Retirement Plan for Certain Salaried Employees (Plan) lawfully excluded Spink from participating because he was over sixty years old. The Plan is a noncontributory defined benefit plan that covers substantially all salaried employees at Lockheed and certain subsidiaries.

Prior to rejoining Lockheed in 1979, Spink worked for Hughes Helicopters, where he expected to receive pension benefits if he continued to work through October 31, 1982. In an effort to recruit Spink from Hughes, Lockheed represented that if he accepted its offer of employment, Spink would participate in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. Lockheed personnel provided him with documents describing the benefits to which he would be entitled, and for the next four years sent him written year-end statements from the Plan notifying him of the amount of credited service he had accumulated as a Plan participant.

Lockheed notified Spink sometime in 1984 that he was not eligible to participate in the Plan because he was over sixty when hired.

In 1986, Congress passed OBRA 1986. OBRA 1986 amended ERISA, the ADEA, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age-based discrimination in participation and benefit accrual standards applied by employee benefit plans.

As a consequence of these amendments, for plan years beginning after January 1, 1988, the effective date of the amendments, Lockheed was required to allow employees hired after age sixty to participate in the Plan. Spink became a participant on December 25, 1988 (the first day of the Plan's 1988 plan year). In 1989, Lockheed informed him that it did not intend to credit him with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. The Plan specifies that an employee who was previously excluded from the Plan would "not receive Credited Service for his pre-Member service []" under the terms of the Plan. Plan § 2.01(C).

On May 8, 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO) and a "1990 Voluntary Retirement Program" (VRP), which were available to certain employees until June 30, 1990 (collectively the "1990 Plan amendments"). These programs offered increased retirement benefits to eligible employees as an incentive to terminate their employment. The increased benefits were paid out of the Plan's surplus assets. To partake in the increased pension benefits, Lockheed required employees to release virtually all potential employment-related claims they might have against Lockheed. Although he was eligible for the SRO option, Spink did not elect it because he did not wish to waive any ADEA and ERISA claims he may have against Lockheed. Spink retired in June 1990.

On February 5, 1992, Spink filed a five-count complaint against Lockheed. He brought all counts in his individual capacity, and also designated Counts I through III as a class action on behalf of all similarly situated employees. Counts I and II allege that the OBRA 1986 amendments to ERISA and ADEA entitle Spink and similarly situated employees to benefits under the Plan calculated on the basis of periods worked both before and after the effective date of the statute. Count III alleges that the 1990 Plan amendments constituted a breach of fiduciary duty and a prohibited transaction under ERISA. Count V alleges that because Spink relied on representations made by Lockheed, Lockheed is estopped from denying him benefits based on all of his employment since his rehire in 1979. Spink withdrew Count IV.

Lockheed moved to dismiss the complaint under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted, and the district court granted Lockheed's motion and dismissed the complaint with prejudice. Spink timely appeals.

II. STANDARD OF REVIEW

We review de novo a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 852 (9th Cir.), *cert. denied,* 115 S. Ct. 580 (1994). In addition, "the interpretation of ERISA, a federal statute, is a question of law subject to de novo review." *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 312 (9th Cir. 1993).

III. AGE DISCRIMINATION CLAIMS UNDER ERISA AND ADEA

We first consider whether the OBRA amendments to the ADEA and ERISA prohibit Lockheed from excluding Spink's and putative class members' pre-1988 years of service in calculating their accrued benefits. We conclude they do.

Prior to OBRA 1986, the ADEA and ERISA permitted an employer to deny participation in its pension plan to an employee who was over age sixty when hired if the plan's retirement age was sixty-five. *See* ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982 & Supp. V 1988); ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982 & Supp. V 1988). Congress enacted OBRA 1986 to change this situation.

The overall objective of the OBRA amendments was to "prohibit arbitrary age discrimination in employment." ERISA § 2, 29 U.S.C. § 621 (1988). To that end, § 9202 of OBRA 1986 amended ERISA by adding:

> [A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i) (1988). Similarly, OBRA § 9201 amended the ADEA by providing:

> [I]t shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits --
>
> > (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . .

ADEA § 4(i)(1), 29 U.S.C. § 623(i)(1) (1988 & Supp. V 1993). With regard to the effective date of these sections, OBRA 1986 provides:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note.

The parties agree that OBRA 1986 prohibits terminating or reducing the rate of benefit accrual because of the employee's age after January 1, 1988. They part ways over whether this prohibition requires that employers consider service years before the effective date of OBRA 1986 in calculating benefit accrual.

As with every question of statutory interpretation, we start with the language of the statute. The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit accrual calculation. OBRA prohibits age-based reduction in "the rate of

benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.[1]

In the context of this case, the Plan provides that "eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service." Plan § 4.01. An employee could participate in the Plan, and therefore accumulate credited service years, "upon being employed in a Covered Group" unless--prior to OBRA's effective date--the employee commenced employment when he or she was sixty years of age or older. Plan § 2.01(B) & (C). Because Spink began work

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[1] Spink and Amicus, the American Association of Retired Persons, argue that including in benefit accrual any service years before OBRA 1986's effective date would not be a retroactive application of the amendments. Rather, they contend, this interpretation would merely apply the current law, prohibiting reduction of benefits based on age, to the operative formula. *See Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422, 424 (N.D. Ill. 1989). We disagree.

To the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively. Retroactivity depends on whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 & n.3 (1994). "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 1499. In light of the fact that OBRA 1986 prohibits a previously legal basis for discriminating in pension plans, and in consideration of the increase in pension obligations that will result from inclusion of pre-enactment service years, we acknowledge that OBRA 1986 operates retroactively *in this context*. However, this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute manifested in its text. *See id.* at 1492; *see also* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4024 ("The conferees recognize that repeal of [law that permits age-based exclusion from plans] may have the effect of increasing an employer's minimum funding requirements significantly from employees hired within five years of normal retirement age.").

in a Covered Group after he had celebrated his sixtieth birthday, he did not become a Member of the Plan when he began work. Had he not been excluded because of his age, he would have begun to accumulate credited service years when he started working in a Covered Group and all those years would be used to calculate the amount of his benefits. Put another way, Spink's credited service was calculated as lower than that of a younger employee's because he was denied credit for all years of his employment in a Covered Group.[2]

Such an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions. The fact that the reduction would be accomplished indirectly, through reducing the number of credited service years, rather than directly by reducing the rate itself, is of no consequence.

Lockheed would have us focus on the cause of the disparity: the previously lawful exclusion of older employees from participation in the Plan. This argument raises the question of cause and effect. Since the cause of the disparity was lawful, Lockheed urges, the disparate result must therefore be lawful. However, OBRA 1986 does not speak to causes. Rather, by invalidating age-based reductions in the Plan's benefit accrual, OBRA 1986 forbids the discriminatory effects of the Plan. Lockheed cannot avoid the prohibition against age-based reductions in benefits by pointing to previously lawful causes of those reductions. *See* 29 U.S.C. § 1001(b); *Kayes v. Pacific Lumber*

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[2] We acknowledge that our holding requiring that employees receive credit for years they were not Plan participants is contrary to Plan § 2.01(C). Section 2.01(C) of the Plan provides that "an Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service." However, plan provisions are not controlling if they are inconsistent with the provisions of ERISA. *See* ERISA § 404(1)(D), 29 U.S.C. § 1104(1)(D) (1988 & Supp. V 1993).

Co., 51 F.3d 1449, 1468 (9th Cir. 1995) (remedial purpose of ERISA requires broad reading).

Congress explicitly excepted some nondiscriminatory causes from its prohibition against disparities in benefit accrual. For example, ERISA § 204(b)(1)(H)(ii), 29 U.S.C. § 1054(b)(1)(H)(ii) (1988), provides:

> A plan shall not be treated as failing to meet the requirements of this subparagraph because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

Under this provision, differences in accrual caused by a plan's service cap or early retirement provisions are permissible, even though they may result in disparities. *See Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1200-01 (8th Cir. 1992). When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply. *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); *Horner v. Andrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), *cert. denied*, 484 U.S. 912 (1987); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992). Therefore, Congress' express exception of some nondiscriminatory causes of disparities in benefit accrual indicates that other discriminatory causes -- such as Lockheed's previously lawful exclusion of Spink from participation -- are not permissible.

Research into the legislative history also verifies our reading of the language of the OBRA 1986 amendments. An earlier version of OBRA 1986 adopted a Senate amendment that specifically provided that OBRA 1986 would apply only to individuals employed after December 31, 1988 and only to accrual

computation periods beginning after December 31, 1986. H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4022, *and* 132 Cong. Rec. 25,044 (1986). Under this provision, pre-1986 employment was clearly excluded. However, Congress rejected this proposal in conference, *see* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023, and instead adopted a provision that would apply to all employees "who have one hour of service in any plan year to which the amendments apply." OBRA § 9204(a)(1). Congress knew the appropriate and specific language necessary to exclude pre-1988 service and chose not to include it. *See Arizona Elec. Power Co-op v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). When Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, we presume that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Finally, we note that other provisions of OBRA 1986 demonstrate that Congress was well aware of how to limit application of the amendment to post-enactment service years. Section 9204(b) provides that "amendments made by section 9203 [amending 29 U.S.C. §§ 1002(24)(B) & 1052(a)(2) and 26 U.S.C. §§ 410(a)(2) & 411(a)(8)] shall apply only with respect to plan years beginning on or after January 1, 1988, and *only with respect to service performed on or after such date*." (Emphasis added). Since Congress chose not to include such a limitation in OBRA § 9204(a), the provision governing the effective date of §§ 9201 and 9202, we can infer that Congress did not intend that limitation to apply to those sections. *See Russello*, 464 U.S. at 23.

Lockheed contends that § 9204(b) compels the opposite result. To reach this conclusion, Lockheed points to the fact that § 9204(b) amends ERISA § 202, 29 U.S.C. § 1052, which contains minimum participation standards. Lockheed starts with the observation that ERISA §§ 204(b)(1) and (b)(4)(A) provide that

benefit accrual is based on years of participation. From there, Lockheed reasons that by limiting the retroactivity of participation requirements through § 9204(b), Congress indirectly limited the benefit accrual calculation to years after OBRA 1986's effective date. If § 9204(b) were the only statement about the effective date of OBRA 1986, Lockheed's reasoning might be persuasive. However, § 9204(b) is directly preceded by § 9204(a)(1), which explicitly pertains to the amendments made by the OBRA provisions at issue, §§ 9201 and 9202.

The first clauses of §§ 9204(a)(1) and 9204(b) are virtually identical. Both state that the amendments they govern shall apply "only with respect to plan years beginning on or after January 1, 1988, . . ." However, the latter portion of § 9204(b) includes the further limitation that the amendments made by § 9203 apply "only with respect to service performed on or after such date." By contrast, § 9204(a)(1) concludes that §§ 9201 and 9202 apply "only to employees who have 1 hour of service in any plan year to which such amendments apply." We cannot comprehend any logical reason why Congress would not include a limitation in the immediately preceding subsection, which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting the application of benefit accrual standards. *See Russello*, 464 U.S. at 23 (declining to find that differing language in two subsections has the same meaning).

All aspects of OBRA 1986's language, structure, and legislative history indicate Congress' intention that pre-enactment service years be included in calculating benefit accrual for older employees.[3] Lockheed withheld Spink's service years from 1979

[3] Both parties have implored us to apply the IRS's proposed regulations interpreting OBRA. Spink seeks to have us follow the reasoning of *Puckett*, 705 F. Supp. at 423, which relied on the IRS's proposed regulations to find that (continued...)

to December 25, 1988. Therefore, Spink has stated a claim for violation of OBRA 1986 upon which relief can be granted.[4]

IV. THE 1990 PLAN AMENDMENTS

Next we turn to Lockheed's amendment of the Plan to allow "purchases" of releases of potential claims. Spink contends that Lockheed violated ERISA when it adopted the 1990 Plan amendments, which required employees to execute a release of all potential claims before they could elect the SRO or VRP options and receive enhanced benefits. He contends that this arrangement involved the use of existing plan assets to benefit Lockheed and constituted a prohibited transaction with a party in interest, a *per*

[3] (...continued)
OBRA requires that pre-1988 service be included in benefit accrual. In reaching its decision, the *Puckett* court relied on the language in the regulations that states, "For a participant who has at least 1 hour of service for the plan sponsor in a plan year beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, including years of service before 1988, because of age in determining the participant's plan benefit." Prop. Treas. Reg. 1.411(b)-2(f)(1)(ii), 26 C.F.R. Part 1, 53 Fed. Reg. 11876, 11884 (April 11, 1988).

Lockheed would instead have us rely on other language in the proposed regulations, "However, a defined benefit plan is not required under section 411(b)(1)(H) and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan . . . ", *id.*, and other provisions that suggest pre-1988 service should not be credited to employees in Spink's position. *See* 26 C.F.R. Part 1, 53 Fed. Reg. 11877.

We decline to apply either of these interpretations. Although the IRS has announced its intention to adopt final regulations that are essentially consistent with these proposed regulations, *see* I.R.S. Notice 88-126; 54 Fed. Reg. 604-01, it has not yet done so, and we need not accord deference to its proposed interpretations. *See Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

[4] In Count V of his complaint, Spink claims that the doctrine of equitable estoppel bars Lockheed from denying credit for his post-1979 service. Because we conclude that OBRA 1986 requires employers to credit preenactment service, we need not address the equitable estoppel claim.

se violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1988).[5] We agree.

ERISA provides, in pertinent part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . .

ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). "Party in interest" is defined in ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C) (1988), to include "an employer any of whose employees are covered by such plan."

Undeniably Lockheed is a party in interest under 29 U.S.C. § 1002(14)(C). It is equally indisputable that a party in interest who benefitted from an impermissible transaction can be held liable under ERISA. *See, e.g.*, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988) (stating that ERISA § 502(a)(3) gives plan participants the right to seek equitable relief against both the trustees who engaged in prohibited transaction and the party in interest who profited from it); *Kyle Rys. v. Pacific Admin. Servs.*, 990 F.2d 513, 516 (9th Cir. 1993) ("Under ERISA § 502(a)(3), 29

[5] Spink also argues in the alternative, both in his complaint and before this court, that Lockheed's 1990 Plan amendments constituted a breach of Lockheed's fiduciary duty, prohibited by ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i), and an unlawful inurement of plan assets barred by ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). Because we hold that Spink's second cause of action states a viable claim for violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106, we leave for another day the issue of whether an employer acts as a fiduciary when it amends the plan in a way that affects plan assets. We also decline to address Spink's anti-inurement argument.

U.S.C. § 1132(a)(3), equitable relief for non-fiduciary liability is available only where a "party in interest" has participated in "prohibited transactions."). The only remaining question, then, is whether the 1990 Plan amendments were a transaction that directly or indirectly benefitted Lockheed.

Lockheed advances two arguments why we should answer this question in the negative. First, Lockheed suggests that by amending the Plan, it was merely imposing an eligibility requirement (signing a release of employment-related claims) on the SRP or VRP benefits. Employers have free rein under ERISA, Lockheed proclaims, to impose eligibility requirements and amend plans. Alternatively, Lockheed argues that the releases it obtained as a result of the 1990 Plan amendments were not a "benefit" to Lockheed in violation of ERISA. We address these arguments in turn.

Relying on *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988), and *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1026 (N.D. Cal. 1988), Lockheed claims that it has the unfettered right to amend the Plan and to establish eligibility requirements. Indeed, this court has held that "[employers] remain free to unilaterally *amend* or *eliminate* [severance] plans, without considering the employees' interests." *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994) (emphasis supplied).

Lockheed misinterprets these statements, however, and overstates its freedom to amend. An employer's freedom to amend, while extensive, is not boundless. Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

ERISA prohibits use of plan assets by or for the benefit of sponsoring parties in interest. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). This prohibition would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question. Similarly, those provisions prohibit plan documents from providing for use of plan funds to buy the releases. In other words, Lockheed cannot avoid the prohibitions of ERISA by writing an amendment instead of a check. *See M & R Invs. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (holding that a plan amendment requiring the plan to lend money is a violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1006(a)(1)(B)); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (finding plaintiff stated a viable claim by alleging that through amending and terminating plan, fiduciaries misused plan assets to further interests other than those of plan participants).

Lockheed's second argument is that the releases either were not a net benefit to Lockheed, or that they were merely an incidental benefit. Lockheed urges that the releases do not yield any net benefit to Lockheed because funds paid in exchange for the releases ultimately reduced the amount of surplus that will revert back to Lockheed upon termination of the Plan. Additionally, Lockheed reasons that the releases did not come free to Lockheed because it is ultimately responsible for any Plan shortfall.

Lockheed's astute examination of the economic realities of this situation ignores the central purpose of ERISA. The statute does not require employers to provide employee benefit plans; however, once an employer places assets in trust for the benefit of employees, it can no longer treat those assets as its own. "The crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators . . . ." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Indeed, Lockheed's reasoning proves too much: It would justify an

employer spending plan assets freely, without regard to any of ERISA's prohibitions. The logic of Lockheed's argument collapses under its own weight.

The releases at issue cannot be accurately characterized as an incidental benefit. Although no copy of the release appears in the record, the Plan describes the releases as waiving "any claims the Eligible Member may have against [Lockheed] arising from termination of employment or otherwise." Plan § 15.03(B)(4). The releases purport to be all-encompassing,[6] and assuming *arguendo* that such releases are valid despite their breadth, they relieved Lockheed of countless liabilities or potential liabilities to thousands of employees. This windfall can hardly be considered an incidental benefit. The fact that the amount of Lockheed's liability is not readily quantifiable does not render it incidental.

For these reasons, we conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed. Spink's second cause of action therefore states a viable claim.

V. COLLATERAL ESTOPPEL

Spink's next contention is that the district court erred when it declined to apply the doctrine of nonmutual offensive collateral estoppel to bar Lockheed from contesting the allegation that it breached its fiduciary duties under ERISA. He argues that Lockheed had a full and fair opportunity to litigate the same issue when it moved to dismiss a nearly identical claim pending before Judge Rafeedie, *see Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990)

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[6] Spink did not raise, and therefore we do not address, the issue of whether Lockheed's waivers are impermissibly broad in their scope, or whether an employer can condition the receipt of benefits on a release of claims.

(unpublished order), and should be bound by the adverse ruling in that case.

Trial courts have broad discretion to determine when to apply offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). The district court did not abuse its discretion by declining to do so here.

"Only a final judgment that is 'sufficiently firm' can be issue preclusive." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988) (citing *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983)). To ascertain the "firmness" of a judgment, courts look to various factors, including whether the decision was tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was actually reviewed on appeal. *Luben*, 707 F.2d at 1040 (quoting Restatement (Second) of Judgments § 13 cmt. g (1982)). In *Luben*, we affirmed the district court's determination that an interlocutory order issued by another judge in the same district was not "sufficiently firm" because "it could not have been the subject of an appeal." *Id.*

Judge Rafeedie's denial of Lockheed's motion to dismiss in *Engineers and Scientists Guild* was not appealable and the parties subsequently settled the case. Under those circumstances, the district court did not abuse its discretion by refusing to apply issue preclusion to bar Lockheed from contesting Spink's fiduciary breach claim.

VI. ATTORNEYS' FEES

Finally, we consider Spink's request for attorneys' fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988). This provision grants us discretion to determine whether to award

attorneys' fees and costs. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

> "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions."

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528-29 (9th Cir. 1993) (*as amended* Mar. 22, 1994) (quoting *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1222 (9th Cir. 1988)). We read § 1132(g)(1) "broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under the plan, should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (internal quotations omitted).

Since most of the pertinent factors weigh in favor of Spink, we conclude that attorneys' fees are appropriate. With respect to Lockheed's culpability, as we indicated above, Lockheed's manipulation of plan assets was in direct contravention of the express provisions of ERISA. Spink's claims in Counts I, II, and III of his complaint posited significant legal questions designated as a class action brought on behalf of all similarly situated employees. Lockheed is well able to satisfy a fee award and our award of fees will deter other employers from manipulating plan assets through plan amendments. Although Lockheed prevailed on the collateral and equitable estoppel claims and its arguments on the age discrimination claim were tenable, its arguments regarding

the validity of the 1990 Plan amendments were meritless. Spink is entitled to attorneys' fees.

VII. CONCLUSION

For the foregoing reasons, the district court's dismissal of Counts I, II, and III of Spink's complaint is REVERSED; the district court's dismissal of Count V and the district court's denial of Spink's motion to collaterally estop Lockheed from contesting the allegation that it breached its fiduciary duty is AFFIRMED; Spink's request for attorneys' fees is GRANTED.

REVERSED in part; AFFIRMED in part.

NOT FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Filed September 1, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(8)

No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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60 pp

QUESTIONS PRESENTED

1. Whether a pension plan sponsor and plan fiduciaries may be held liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when the plan sponsor amends its pension plan to create new benefits for a voluntary retirement program made subject to specified eligibility criteria and plan benefits are then paid to eligible participants pursuant to the terms of the amended plan.

2. Whether the Omnibus Budget Reconciliation Act of 1986, which amended ERISA and the Age Discrimination in Employment Act, applies retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation.

PARTIES

The parties are Lockheed Corporation; Daniel M. Tellep; Robert A. Furman; Vincent N. Marafino; K.H. Anderson; L. Bernard; R.W. Berry; P.N. Braun-Agel; D.L. Bronco; R.H. Northcutt; W.E. Skowronski; A.G. Van Schaick; and W.T. Vincent, Petitioners; and Paul L. Spink, Respondent (on behalf of himself and similarly situated individuals).

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioners state that Lockheed Corporation has previously listed its parent and nonwholly owned subsidiary corporations in the Petition for a Writ of Certiorari. Since the filing of the Petition, Lockheed Corporation's parent, Lockheed Martin Corporation, has publicly announced the proposed acquisition of Loral Corporation. Upon completion of this acquisition, which is expected to conclude in Spring 1996, Lockheed Martin Corporation is anticipated to have the following additional subsidiaries (other than wholly owned subsidiaries): Loral Space Communications, Ltd.; Canada Continental Satellite Corporation; Servicios Tecnicos Loral de Mexico, S.A. de C.V.; WITG, Inc.; Space Systems/Loral, Inc.; International Space Technology, Inc.; Cosmotech; SS/L Export Corporation; Be MI AG; L/E Systems Corporation; Mikrodalga Elektronik Sistemler Sanayi Ve Tacaret Anonim Sirketi; MLRS International Corporation; Valley Association Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

BRIEF FOR PETITIONER 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. LOCKHEED'S AMENDMENT OF THE PLAN TO CREATE THE VOLUNTARY RETIREMENT PROGRAM IS NEITHER A BREACH OF FIDUCIARY DUTY NOR A PROHIBITED TRANSACTION. 11

A. A Plan Sponsor Such As Lockheed Is Not Subject To Fiduciary Standards When Adopting Eligibility Requirements For A New Plan Benefit . . 11

B. Lockheed Did Not Engage In A Prohibited Transaction In Violation Of ERISA § 406 By Amending The Plan to Create New Benefits 20

C. Conditioning The Payment Of Increased Pension Benefits Upon The Execution Of A Release Was Expressly Approved By Congress In Its 1990 Amendments To The ADEA And Is Consistent With Common, Well-Established Business Practices 25

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *LANDGRAF V. USI FILM PRODUCTS* BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT 29

A. The Changes In The Pension Benefit Accrual Rule Which Were Made By OBRA 1986 Show That Congress Addressed Two Distinct Issues: Exclusion Of Employees Over Age 60 When Hired, And Pension Benefit Accrual For Employees Who Worked Past Normal Retirement Age 31

B. The Plain Language Of OBRA 1986 Provides That The New Benefit Accrual Rules Apply Prospectively 34

C. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Applies Retroactively 39

D. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only With Respect To Individuals Such As The Respondent Who Were Not Plan Participants Before OBRA 1986 42

E. The Legislative History Provides No Evidence That Congress Intended Sections 9201 And 9202 To Apply Retroactively 45

CONCLUSION 48

TABLE OF AUTHORITIES

Cases — **Page(s)**

AARP v. EEOC, 655 F. Supp. 228 (D.D.C.), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987) 33

Adams v. Avondale Industries, Inc., 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) 12

Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504 (1981) 16, 19

Akers v. Palmer, 71 F.3d 226 (6th Cir. 1995) 20

Amato v. Western Union Int'l, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) 6,21,23

Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993) 28

Averhart v. U S West Management Pension Plan, 46 F.3d 1480 (10th Cir. 1994) 15

Bell v. Trustees of Purdue University, 658 F. Supp. 184 (N.D. Ind. 1987), *remanded*, 845 F.2d 1023 (7th Cir. 1988), *on remand*, 761 F. Supp. 1360 (N.D. Ind. 1991), *aff'd*, 975 F.2d 422 (7th Cir. 1992) 33

Bob Jones University v. United States, 461 U.S. 574 (1983) 44

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 43

Cirillo v. ARCO Chemical Co., 862 F.2d 448 (3d Cir. 1988) 28

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 113 S. Ct. 2006 (1993) 24

Curtiss-Wright Corp. v. Schoonejongen, ___ U.S. ___, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995) 12,13

Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991) 14,19

Foltz v. U.S. News & World Report, Inc., 865 F.2d 364 (D.C. Cir.), *cert. denied*, 490 U.S. 1108 (1989) 19

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 45

Harlan v. Sohio Petroleum Co., 677 F. Supp. 1021 (N.D. Cal. 1988) 28

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 19

Izzarelli v. Rexene Prods. Co., 24 F.3d 1506 (5th Cir. 1994) 15

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473 U.S. 134 (1985) 20,24

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490 U.S. 714 (1989) 45

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508 U.S. 248, 113 S. Ct. 2063 (1993) 24

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740 F.2d 454 (6th Cir. 1984),
cert. denied, 469 U.S. 1109 (1985) 15

Phillips v. Amoco Oil Co.,
799 F.2d 1464 (11th Cir. 1986),
cert. denied, 481 U.S. 1016 (1987) 20

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 12,13

Siskind v. Sperry Retirement Program, Unisys,
47 F.3d 498 (2d Cir. 1995) 14,15,27

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70 F.3d 173 (1st Cir. 1995) 28

Trenton v. Scott Paper Co.,
832 F.2d 806 (3d Cir. 1987),
cert. denied, 485 U.S. 1022 (1988) 15

Statutes

Internal Revenue Code

§ 410(a)(2), 26 U.S.C. § 410(a)(2) 32,42
§ 411(b)(1)(H)(i), 26 U.S.C. § 411(b)(1)(H)(i) 33

Age Discrimination in Employment Act

§ 4(i)(1), 29 U.S.C. § 623(i)(1) 1,33,43
§ 7(f)(1)(H), 29 U.S.C. § 626(f)(1)(H) 26

Employee Retirement Income Security Act

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) 1,5,11-12,18,21,23
§ 201(1), 29 U.S.C. § 1051(1) 13
§ 202(a)(2), 29 U.S.C. § 1052(a)(2) 32
§ 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C) 34
§ 204(b)(1)(H)(i),
29 U.S.C. § 1054(b)(1)(H)(i) 1,33,43
§ 301(a)(1), 29 U.S.C. § 1081(a)(1) 13
§ 401, 29 U.S.C. § 1101 12,13
§ 403(c)(1), 29 U.S.C. § 1103(c)(1) 5,8,14,19
§ 404, 29 U.S.C. § 1104 5,8,13,18,19,20
§ 406, 29 U.S.C. § 1106 5,8,9,18-24
§ 406(a)(1), 29 U.S.C. § 1106(a)(1) 1
§ 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) . . . 8,20,23
§ 408(c)(1), 29 U.S.C. § 1108(c)(1) 19
§ 502(e), 29 U.S.C. § 1132(e) 6

Omnibus Budget Reconciliation Act of 1986

§ 9201 1,10,33-37
§ 9202 10,33-38
§ 9202(a)(2) 1
§ 9203 1,32,38
§ 9204 1
§ 9204(a) 7,40
§ 9204(a)(1) 10,35,38,39,40,45
§ 9204(b) 10,38,39,40

§ 9204(e) 43

Judicial Code

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 6

Administrative Interpretations

43 Fed. Reg. 43,264 (1978) 33
53 Fed. Reg. 11,876 (1988) 43

Prop. Treas. Reg. § 1.411(b)-2 43
Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii) 43

Temp. Treas. Reg. § 1.411(a)-4T(c), Example 1 . . 28

Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) 28
Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(B) 28
Treas. Reg. § 1.401(k)-1(a)(3)(iv) 27
Treas. Reg. § 1.411(a)-4(c), Example 1 28

T.A.M. 9516005 (Dec. 22, 1994) 29

IRS Notice 88-126, 1988-2 C.B. 538 (1988) 44

Legislative History

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2d Sess. (1974), *reprinted in*
1974 U.S.C.C.A.N. 5038 22

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of the United States of America 17, 31

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Strategies Used in Selected
Organizations*,
GAO/GGD 95-54 (1995) 25

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 616, and is reprinted in the Joint Appendix ("J.A.") at 76. The court's denial of rehearing, J.A. at 95, is unreported. The district court's opinion is unofficially reported at 15 Employee Benefits Cas. (BNA) 2242 and 61 Empl. Prac. Dec. (CCH) ¶ 42,094, and is reprinted in the Joint Appendix at 62.

JURISDICTION

The court of appeals' opinion was filed on July 18, 1995. J.A. at 76. A timely petition for rehearing was denied on September 1, 1995. J.A. at 95. The petition for a writ of certiorari was timely filed on November 24, 1995, and was granted on January 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are involved in this case: the Employee Retirement Income Security Act ("ERISA") § 3(21)(A), 29 U.S.C. § 1002(21)(A); ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1); § 9201 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 29 U.S.C. § 623(i)(1); § 9202(a)(2) of OBRA 1986, 29 U.S.C. § 1054(b)(1)(H)(i); § 9203 of OBRA 1986, 100 Stat. 1979 (1986); and § 9204 of OBRA 1986, 100 Stat. 1979-80 (1986), *codified at* 29 U.S.C. § 623 note. The pertinent text of these statutes is set forth in the Appendix to the Petition for a Writ of Certiorari at 36a-39a.

STATEMENT OF THE CASE

Factual background. Petitioner Lockheed Corporation ("Lockheed") sponsors a noncontributory defined benefit pension plan, the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan"). Prior to 1986, Lockheed was permitted, by the express terms of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA") and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), to lawfully exclude from Plan participation those employees who were hired within five years of normal retirement age. Lockheed's Plan contained such a provision, which stated that an employee who was more than 60 years old when hired was not eligible to participate in the Plan.[1] J.A. at 58. Congress eliminated this exclusion from pension plan participation when it enacted the Omnibus Budget Reconciliation Act of 1986, 100 Stat. 1973 (1986) ("OBRA 1986"), with the proviso that the new rule would not take effect until 1988. Lockheed subsequently amended § 2.01(C) of its Plan to reflect this change in the law. J.A. at 42.

Respondent Paul L. Spink was first employed by Lockheed in 1939, and then intermittently through 1950. J.A. at 11. After an interim of nearly 30 years, during which he worked for other employers in the defense industry, Lockheed again hired respondent in 1979, at age 61. J.A. at 14. Respondent did not become a Plan participant at this time, because he was over 60 years old. Instead, respondent first became a Plan participant on

[1] The Plan refers to a participant as a "Member," as defined in Plan § 1.16. J.A. at 41. Lockheed will use the term "participant" throughout this Brief.

December 25, 1988, when OBRA 1986 took effect with respect to Lockheed's Plan.[2] J.A. at 42.

In 1990, Lockheed offered a voluntary retirement window program for the purpose of reducing the size of its workforce in connection with a drastic reduction in Lockheed's business operations in Southern California. In order to implement this decision, Lockheed's Board of Directors amended the terms of the Plan to create the 1990 Special Retirement Opportunity ("SRO").[3] J.A. at 59. This program was designed to provide eligible employees with an additional three years of service credit, so that they would receive pension benefits beyond those to which they would otherwise be entitled, if they voluntarily retired from their Lockheed employment. J.A. at 51-52, 56-57. Eligibility for these enhanced early retirement benefits was made subject to certain conditions specified in the Plan amendment. These conditions included (1) being eligible for early or normal retirement under § 5.01 or § 5.02 of the Plan; (2) electing to retire by the date specified in the SRO; (3) executing a release of employment-related claims stating that the employee would accept benefits under the

[2] The pertinent provisions of OBRA 1986 apply to plan years beginning on or after January 1, 1988. Lockheed's first Plan year following January 1, 1988, commenced on December 25, 1988. Plan § 1.20, J.A. at 41.

[3] The SRO consisted of two programs which were incorporated in the Plan amendment: a Special Retirement Program which was made available to certain employees who had already received layoff notices and would agree to convert their layoff into a voluntary retirement, and a Voluntary Retirement Program which was available to certain employees who had not been notified of layoff but were nonetheless willing to elect voluntary retirement. J.A. at 61.

SRO in lieu of pursuing such claims;[4] and (4) actually terminating employment by the specified date. J.A. at 49-51, 54-56.

Respondent was not willing to release Lockheed from his employment-related claims, *i.e.*, his claim that the ADEA as amended by OBRA 1986 required retroactive pension benefit accrual; thus he decided not to participate in the voluntary retirement program and never signed any release. Instead, respondent worked until June 30, 1990, when he voluntarily retired from Lockheed. J.A. at 11. Respondent concedes that Lockheed has complied with the written terms of the Plan in calculating his pension benefits at all times since his retirement. J.A. at 63 n.1.

The complaint. The district court complaint, filed by respondent on behalf of himself and as representative of a class of persons similarly situated, challenged both the release requirement of the 1990 SRO, as well as Lockheed's decision not to retroactively credit respondent and the putative class members for pension benefit accruals prior to the time they became Plan participants, *i.e.*, December 25, 1988. On the challenge to the design of the 1990 early retirement program, the complaint alleged that Lockheed, and individual members of its Board of Directors, breached the fiduciary duty provisions of ERISA by amending the Plan to require a release as a condition of receipt of the newly created pension benefits. J.A. at 21-24. This claim was premised

[4] The Plan amendment required a waiver by the eligible participant of claims against the employer "arising from termination of employment or otherwise." Plan § 15.02(B)(4), J.A. at 50; Plan § 15.03(B)(4), J.A. at 55. The complaint alleged that an eligible participant was required to release "almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment. . . ." J.A. at 22. The release itself is not in the record. The lower courts did not decide any issue as to the scope or enforceability of the release.

on the allegation that Lockheed acted not only as the Plan sponsor, but also as a "fiduciary" within the meaning of § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), when it amended the Plan to create the 1990 SRO. J.A. at 7, 22. Respondent alleged in the complaint that Lockheed breached a fiduciary duty under either § 404 or § 406 of ERISA because the Plan was overfunded, J.A. at 10, and because "the Plan's assets were used at least in part by defendant Lockheed to relieve itself of various liabilities or potential liabilities to thousands of its employees." J.A. at 22.[5]

On the second point – whether OBRA 1986 requires retroactive pension benefit accruals – the complaint alleged that Lockheed's decision not to retroactively accrue pension benefits for pre-1988 employment service violated the ADEA and ERISA. J.A. at 16-17. Respondent did not dispute the proposition that, under the law that applied to Lockheed prior to December 25, 1988, the Plan lawfully excluded from participation individuals such as himself who were hired within five years of normal retirement age and who had not accrued any pension benefits under the Plan prior to that date. Nonetheless, respondent alleged that OBRA 1986 required Lockheed to provide retroactive benefit accrual for his pre-1988 employment upon his becoming a Plan participant in 1988. J.A. at 17.

[5] Although the complaint did not allege that Lockheed violated ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), respondent argued below in support of his claim that a further fiduciary breach resulted because the Plan amendment caused a benefit to "inure" to Lockheed in violation of § 403(c)(1). The district court found this argument inapposite because the alleged breach of fiduciary duty arose from the nonfiduciary conduct of plan amendment. J.A. at 69. The court of appeals noted, but did not rule upon, respondents' "anti-inurement" argument. J.A. at 88 n.5.

Respondent also alleged an individual claim for benefits due him under the terms of the Plan. J.A. at 24-27. Respondent, however, expressly abandoned this claim in the district court in response to petitioners' motion to dismiss. J.A. at 63 n.1. Thus no issue of Plan interpretation nor any claim for benefits under the Plan is presented to this Court.

The district court's decision. The district court, in a decision by Judge Stephen V. Wilson, granted Lockheed's Rule 12(b)(6) motion to dismiss the complaint prior to any decision as to whether a class should be certified. The district court's jurisdiction was based upon § 502(e) of ERISA, 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331. The court rejected respondent's argument that Lockheed had breached a fiduciary duty or engaged in a prohibited transaction under ERISA by amending the Plan to condition eligibility for the enhanced early retirement benefits upon a release of employment-related claims. The court noted that "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." J.A. at 67, quoting *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986). The court concluded that "the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan . . . " J.A. at 68. Because Lockheed had acted in a corporate, rather than fiduciary, capacity when amending the Plan, the court concluded that "[Lockheed's] actions can not comprise a breach of the fiduciary duty owed to the Plan participants because no such fiduciary duty existed." J.A. at 68-69.

The district court also held that the "plain language of OBRA 1986 . . . defeats Plaintiff's claim" for retroactive benefit accrual. J.A. at 65. In finding that OBRA 1986 had prospective effect only, the court observed that OBRA 1986 expressly provided that eligibility for pension plan participation for employees hired within five years of normal retirement age (and thus lawfully excluded from a plan) was to begin only with plan fiscal years commencing on or after January 1, 1988, which in Lockheed's case was December 25, 1988. J.A. at 65. The court then concluded that "because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual." *Id.* The court also noted that "the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion," since § 9204(a) of OBRA 1986 expressly limited application of these amendments to plan years beginning on or after January 1, 1988. J.A. at 66. Given this "unambiguous statutory language," the court concluded that "Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation." *Id.*

The court of appeals decision. The court of appeals, in a decision authored by Judge Melvin Brunetti and joined by Judges Stephen Reinhardt and Dorothy W. Nelson, reversed the decision of the district court on both of respondent's claims.[6] First, it held that OBRA 1986 applies retroactively. Thus, the court determined

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[6] The court of appeals acknowledged that respondent had abandoned his individual claim for benefits under the Plan in the district court by expressly withdrawing Count IV of the complaint. J.A. at 79. Thus any claim for benefits under the terms of the Plan has been waived. The court of appeals also concluded that it was not necessary to address the district court's dismissal of the promissory estoppel claim in Count V of the complaint. J.A. at 87 n.4.

that OBRA 1986 requires employers not only to permit employees who had been hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively "include pre-enactment service years in calculating accrued benefits." J.A. at 82 n.1. In reaching this conclusion, the court expressly disagreed with the administrative interpretation of the Internal Revenue Service ("IRS") that there is no requirement for retroactive pension benefit accruals in the case of individuals who had not previously been Plan participants. J.A. at 86-87 n.3.

The court of appeals also held that Lockheed breached its fiduciary duty under ERISA § 406 by amending the Plan to require a release of claims as a precondition to receipt of the additional retirement benefits created by the 1990 SRO. J.A. at 87-91. Although the court acknowledged the abundant case law holding that Lockheed has "extensive" freedom to amend its Plan, it held that Lockheed was "not free to disregard the prohibitions of ERISA." J.A. at 89. Specifically, the court concluded that, by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under § 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), because the Plan amendment "provided for use of Plan assets to purchase a significant benefit for Lockheed." J.A. at 91. The court of appeals did not decide whether Lockheed had violated § 404 of ERISA as alleged in the complaint, nor did it address respondent's argument – not alleged in the complaint – that the Plan amendment violated the "anti-inurement" provision of ERISA § 403(c)(1). J.A. at 88 n.5.

SUMMARY OF ARGUMENT

As this Court has recognized, a plan sponsor's decision to amend an ERISA plan to create new benefits or expand existing benefits is not regulated by fiduciary standards. This flows both from the statutory definition of a "fiduciary" under ERISA, as well as the recognition that a plan sponsor's decision to establish or change benefit levels and eligibility criteria inevitably reflects the plan sponsor's self-interest and cannot logically be subjected to review under ERISA's demanding fiduciary standards. Indeed, subjecting plan amendment decisions to fiduciary review would severely deter employers from creating pension plans in the first instance as well as enhancing existing plans to create new benefits.

The Ninth Circuit's decision that Lockheed is liable under the "prohibited transaction" rule of ERISA § 406 improperly imposed fiduciary obligations upon Lockheed for non-fiduciary conduct. Both the text and placement of § 406 make it clear that the prohibited transaction rule is designed to regulate fiduciary conduct. The Plan amendment to create a new pension benefit for employees willing to elect voluntary retirement cannot therefore constitute a prohibited transaction since it is not a fiduciary act under ERISA, and for the further reason that an amendment to the Plan is not a "transaction" within the meaning of ERISA § 406.

The fact that Lockheed received something in return from the eligibility conditions adopted along with the new pension benefits does not change this result, because plan sponsors generally do not amend their plans to adopt new benefits, or to increase existing benefits, unless they perceive some self-interest in so doing. Moreover, the benefit Lockheed derived from its Plan amendment, though less certain, valuable, or significant than other

benefits (such as wage reductions, strike settlements, and work force reductions) that plan sponsors routinely insist upon when amending their plans to increase benefits, is legally indistinguishable from these common practices. Congress never intended that ERISA put these common practices and the resulting plan benefit increases in jeopardy. To the contrary, an employer's ability to provide increased ERISA plan benefits in exchange for a release of claims was approved by Congress in its 1990 amendments to the ADEA.

The Ninth Circuit also erred in holding that the pension benefit accrual requirements of OBRA 1986 apply retroactively. Under this Court's decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), statutes are presumed to have prospective application only and will not be applied retroactively in the absence of "clear congressional intent favoring such a result." 114 S. Ct. at 1505. In this case, there is no statutory language in § 9204(a)(1) of OBRA 1986 which expressly commands retroactive application of §§ 9201 and 9202. The Ninth Circuit's reliance upon "negative inferences" drawn from the inclusion of slightly different effective date language in § 9204(b) does not survive scrutiny, because *Landgraf* expressly rejected a similar argument and because the Ninth Circuit's analysis fails to recognize that Congress had other reasons for using different statutory language in § 9204(a)(1) and § 9204(b). In addition, even before *Landgraf*, the IRS interpreted OBRA 1986 as having prospective application only with respect to employees such as respondent, and this authoritative administrative interpretation is entitled to deference when interpreting the statute. Finally, the Ninth Circuit's decision misreads the legislative history of OBRA 1986 and fails to take into account those portions of the

legislative history which expressly reflect an intent that the statute not apply retroactively.

ARGUMENT

I. LOCKHEED'S AMENDMENT OF THE PLAN TO CREATE THE VOLUNTARY RETIREMENT PROGRAM IS NEITHER A BREACH OF FIDUCIARY DUTY NOR A PROHIBITED TRANSACTION.

A. A Plan Sponsor Such As Lockheed Is Not Subject To Fiduciary Standards When Adopting Eligibility Requirements For A New Plan Benefit.

Under ERISA, a plan sponsor such as Lockheed can be a fiduciary for one purpose but not another. This principle is expressly incorporated in the statutory definition of a "fiduciary," as set forth in ERISA § 3(21)(A):

> [A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A) (emphasis added).

In this case, Lockheed is the Plan sponsor and undeniably a fiduciary for certain purposes. But Lockheed did not act in a fiduciary capacity when it amended the Plan to create new pension benefits for employees willing to accept voluntary retirement. This is because amending the Plan to create a new retirement benefit is a settlor function, which was undertaken by Lockheed in its corporate capacity.[7]

The Court has recently recognized the principle that amending a welfare benefits plan is not a fiduciary function. *Curtiss-Wright Corp. v. Schoonejongen*, ___U.S. ___, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"), quoting *Adams v. Avondale Industries, Inc.*, 905 F. 2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990). The same rule applies with equal force when an employer amends a pension plan since the fiduciary standards of ERISA are identical with respect to both pension and welfare benefit plans. *See* 29 U.S.C. § 1101; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) ("[ERISA] sets various uniform standards, including rules concerning . . . fiduciary responsibility, for both pension and welfare plans").

[7] Section 13.01(B) of the Plan identifies "Lockheed Corporation, as Plan Sponsor" as a named fiduciary under the Plan and provides that, as Plan Sponsor "[a]ny authority assigned or reserved to the Corporation under the Plan and Trust Agreement shall be exercised by resolution of the Board of Directors." J.A. at 45. Section 13.02(B) of the Plan expressly provides that "Lockheed Corporation shall have the authority and responsibility for (1) the design of the Plan and Trust Agreement, including amendment of the Plan and Trust Agreement . . . ." J.A. at 46. Section 14.01 provides in pertinent part that "[t]he Corporation reserves the right to amend, modify, suspend or terminate the Plan by action of the Board of Directors." J.A. at 48.

Defined benefit pension plans are, of course, subject to certain provisions of ERISA which do not apply to welfare plans, most notably the minimum participation, funding, and vesting requirements set out in Parts 2 and 3 of Subchapter I, Subtitle B, of ERISA.[8] *Shaw*, 463 U.S. at 91. There has never been any claim in this litigation, however, that the 1990 amendment to Lockheed's Plan violates any of these substantive requirements: the Plan amendment did not deny respondent the right to continued participation in the Plan, nor did it diminish any of his vested pension benefits, nor did it cause the Plan to become underfunded. Instead, the Plan amendment provided *additional* pension benefits to eligible participants who voluntarily elected retirement and met the eligibility requirements established at the same time the additional benefits were created. The amendment therefore falls within the broad latitude accorded to plan sponsors to freely amend their plans, since ERISA's minimum standards were fully satisfied and because amending a plan to increase benefits is not regulated by fiduciary standards. *Curtiss-Wright Corp.*, 115 S. Ct. at 1228.

This principle is basic given the purpose of defined benefit pension plans. When amending a defined benefit plan to provide increased benefits, the plan sponsor is changing the benefit *promise* it has made to participants which the plan is designed ultimately to deliver to them. Changing the benefit promise is not plan administration. Neither is it using nor dealing with the assets of the plan. While the benefit promise and the administration of plan

[8] ERISA's participation and vesting requirements are set forth in Part 2, 29 U.S.C. §§ 1051-61, and expressly exclude welfare plans from coverage. 29 U.S.C. § 1051(1). Funding requirements are set forth in Part 3, 29 U.S.C. §§ 1081-86, and similarly exclude welfare plans. 29 U.S.C. § 1081(a)(1). By contrast, the fiduciary responsibility provisions contained in Part 4, 29 U.S.C. §§ 1101-14, apply equally to both pension and welfare plans. 29 U.S.C. § 1101.

assets are related because plan assets must be prudently managed by fiduciaries to fulfill the sponsor's benefit promise, the creation and modification of that benefit promise and the management and control of plan assets are entirely distinct.

Consistent with this principle, the courts of appeals have uniformly held that amending a pension plan to create a new retirement program is *not* a fiduciary act. For example, in *Fletcher v. Kroger Co.*, 942 F.2d 1137 (7th Cir. 1991), the Seventh Circuit held that amending a pension plan to create an early retirement program available only to selected employees "was a design decision that did not implicate [the employer's] fiduciary duties under ERISA." *Id.* at 1139. As in the instant case, the new retirement program in *Fletcher* was limited to a specified "window" period, and was created to benefit the plan sponsor by "encourag[ing] voluntary early retirement in an effort to eliminate a work force surplus at several plants." *Id.* at 1138. Because the creation of the voluntary retirement program as well as the determination of its eligibility criteria were not fiduciary decisions, the Seventh Circuit rejected plaintiffs' argument that the plan amendment violated either § 403(c)(1) or § 404 of ERISA, 29 U.S.C. §§ 1103(c)(1), 1104. 942 F.2d at 1139.

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995), reflects the same rule. There, the court held that "[a]n employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary." *Id.* at 505. The voluntary retirement program in *Siskind* was funded by the pension plan's existing surplus of over $300 million, and was offered to specified employees who were selected for business reasons. *Id.* at 501. The design of the program admittedly reflected corporate rather than fiduciary

interests: "[w]hich employees to offer these benefits, and which to exclude, were decisions made solely to advance the business goals of [the employer]." *Id.* at 502. As in *Fletcher*, the court of appeals found no breach of fiduciary duty because the decision to create the voluntary retirement program, as well as the determination of eligibility criteria for the program, were outside the scope of fiduciary review.[9] *Id.* at 505.

The decision to exclude plan amendment and design decisions from the scope of fiduciary review under ERISA is fully consistent with Congress' desire to encourage employers to create new pension plans and expand existing plans. "One of Congress' purposes in adopting ERISA was to further the formation of retirement benefit plans." *Siskind, supra*, 47 F.3d at 505. "Had ERISA subjected employer's amendments to stringent review, employers would have been less willing to create retirement plans." *Id.* The instant case illustrates quite well the quandary for a plan sponsor if its decision to create a new benefit program is subject to fiduciary review. The holding below that a plan sponsor can be held liable for creating new pension benefits would provide a

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[9] *Accord, Averhart v. U S West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) ("the selective provision of benefits under the [pension plan] amendment was a matter of plan design not subject to ERISA's fiduciary standards and judicial review"); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan"); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987) (pension plan amendment which adopted early retirement program was not a fiduciary act), *cert. denied*, 485 U.S. 1022 (1988); *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984) ("[n]either Congress nor the courts are involved in either the decision to establish a [pension] plan or in the decision concerning which benefits a plan should provide"), *cert. denied*, 469 U.S. 1109 (1985).

powerful deterrent to creating new pension plans and new benefits within existing plans, since it would subject the plan's benefit eligibility criteria to a stringent fiduciary review rather than simply permitting the plan sponsor to determine these conditions, consistent with ERISA's minimum requirements, when establishing new benefits. Such a deterrent is wholly inconsistent with the legislative purpose behind ERISA. *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S., 504, 511 (1981) ("That the private parties, not the Government, control the level of benefits is clear from the statutory language . . . of ERISA.").

To be sure, the Ninth Circuit purported to hold a plan sponsor liable as a fiduciary only if the plan amendment provides the sponsor with a "significant benefit." J.A. at 91. But this rationale finds no support in the text of ERISA and ignores the basic purposes of creating and amending plans in the first place. Employers generally do not increase pension benefits out of charitable benevolence. Indeed, to do so would arguably violate other fiduciary duties owed by a corporate employer to its shareholders. An employer will increase plan benefits, which are a form of employee compensation, precisely because it serves the employer's interests. What is a "significant benefit" to one employer may not be to another. A rule of decision that requires the significance of the benefit to the employer to be determined and quantified, on a case by case basis in advance of adopting plan amendments, assures that few employers would venture forth to increase pension benefits except in the rare case when the employer could show the benefit increase produced no value to the employer. It is more likely, of course, that benefit increases would simply not occur. *See* Renaud, *Spink v. Lockheed Corporation: The Ninth Circuit Outlaws Pension Plan Window Waivers*, 73 Taxes - The Tax Magazine (CCH) 603, 608 (Nov. 1995) (herein referred to as

"Taxes"); Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 18-19.

The correct approach was set forth by Judge Easterbrook, in a recent decision from the Seventh Circuit. *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). There, a company that maintained an overfunded pension plan found itself the target of a hostile takeover bid. Seeking to make itself an unattractive target and thus retain corporate control in its current management, the corporation amended its pension plan to provide that, if a takeover occurred, the surplus plan assets would be fully used to pay benefits to active employees only. Certain retirees sued, contending among other things that the corporation had breached a fiduciary duty by "using" plan assets to serve its own interests.

The court assumed for purposes of its decision that the corporation's "managers were up to no good – that they amended the pension plan to serve their own interests." 19 F.3d at 1186. Even with the assumption that the plan was amended for reasons of "managerial self-protection," *id.*, the court affirmed the dismissal of the plaintiffs' claim on the ground that the company had "dealt with the plan as settlor, not as trustee," *id.* at 1188, and that "when amending the plan . . . the defendants did not act as fiduciaries under ERISA." *Id.* If the same reasoning is applied in this case, and to be consistent with ERISA's regulatory scheme it should, Lockheed could not be held liable for breach of fiduciary duty merely because it amended the Plan to create new pension benefits as part of a voluntary retirement window program adopted to ameliorate the effects on long-term employees of a business relocation and which had as one of the criteria for eligibility a waiver of employment-related claims.

Johnson correctly emphasized that ERISA's regulation of fiduciary conduct focuses on the management of plan assets – not decisions which expand or reduce plan liabilities to participants. 19 F.3d at 1189. Understanding both the economics of pension plan funding and the benefit promise to participants that a plan is designed to deliver, the court pointed out that "Section 1002(21)(A)(i), in conjunction with [29 U.S.C.] §§ 1104 and 1106, requires trustees and other persons to deal with the assets of the plan in circumspect and prudent ways. It has nothing at all to say about the debit column of the balance sheet – yet the amendments [defendant] made to the plan affected *only* the plan's liabilities." *Id.* (emphasis in original). The court went on to hold that because the plan's assets were used only to make payments to participants and beneficiaries, the plan amendment at issue did not represent the "'management or disposition of [a plan's] assets' within the meaning of ERISA." *Id.*, quoting ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

In contrast to *Johnson*, the court below erred by holding that Lockheed's amendment of the Plan to provide additional pension benefits was a fiduciary act. J.A. at 91. This holding improperly imposed fiduciary responsibilities upon an employer when it amends a plan. The fallacy of this reasoning is that amending a pension plan to increase the benefits paid to participants is *not* prohibited by ERISA, so long as the statutory minimum standards are satisfied, and is *not* under any circumstances a fiduciary act within the meaning of ERISA. As a result, Lockheed's decision to amend the Plan to create new benefits does not violate any type of fiduciary duty, regardless of

whether the issue is analyzed under § 403(c)(1),[10] § 404, or § 406 of ERISA. The decision below severely curtails a plan sponsor's freedom to amend a plan under ERISA, because it holds for the first time that a plan sponsor can be liable when it creates new plan benefits in a manner consistent with ERISA's minimum requirements. The judgment below should be reversed because amending a plan in this fashion does not constitute fiduciary conduct regulated by ERISA.[11]

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[10] Respondent argued below in support of his claims that, in addition to §§ 404 and 406, the Plan amendment also violated § 403(c)(1), which states that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries . . . ." There is no violation of § 403(c)(1) in this case, because the Plan amendment simply increased the level of pension benefits paid to specified participants and beneficiaries. *See, e.g.*, *Fletcher*, 942 F.2d at 1139-40 (rejecting a similar argument based upon § 403(c)(1)); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988) (early retirement program does not violate § 403(c)(1)). Moreover, respondent's argument would, if accepted, render unlawful any plan amendment which increases benefits where the employer perceives a self interest in doing so. Thus, the assets of the plan do not "inure" to the employer's benefit if they are paid out to participants in the form of benefits even if those payments to participants also provide a benefit to the employer.

[11] No issue is presented in this case as to whether a fiduciary breach would occur if the Plan amendment purported to direct the fiduciaries to engage in conduct that violated some other provision of ERISA. For example, a plan provision which directed the fiduciaries to invest plan assets in an imprudent fashion or which failed to satisfy the minimum vesting or participation requirements could arguably lead to a breach of fiduciary duty if the fiduciaries followed the terms of the plan. There is no provision in ERISA, however, which prohibits fiduciaries from paying pension benefits to eligible participants as required by the plan. *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("That the private parties, not the Government, control the level of benefits is clear from the statutory language . . . of ERISA."); *Foltz v. U.S. News & World Report, Inc.*, 865 F.2d 364, 371 (D.C. Cir.) ("rights under ERISA are largely defined by the plan document"), *cert. denied*, 490 U.S. 1108 (1989). Indeed, ERISA expressly exempts the payment of plan benefits *to a fiduciary* (who is also a participant or beneficiary) from the prohibited transaction rule. 29 U.S.C. § 1108(c)(1).

B. Lockheed Did Not Engage In A Prohibited Transaction In Violation Of ERISA § 406 By Amending The Plan to Create New Benefits.

Despite the abundant case law holding that plan amendment is not a fiduciary function, the court of appeals erroneously imposed fiduciary obligations upon Lockheed by holding that Lockheed engaged in a prohibited transaction, made unlawful by ERISA § 406, when it amended the Plan to create the 1990 voluntary retirement window program. This result is erroneous because § 406 does not apply to non-fiduciary activities such as Lockheed's decision to amend the Plan.

The statutory language of § 406 confirms that it is intended to regulate specifically defined fiduciary conduct: "[*a*] *fiduciary with respect to a plan* shall not cause the plan to engage in a transaction [that] constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." 29 U.S.C. § 1106(a)(1)(D) (emphasis added). In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985), this Court acknowledged that § 406 regulates fiduciary conduct: "ERISA establishes duties of loyalty and care for fiduciaries. With regard to loyalty, the principal provision is § 406 . . . ." The courts of appeals, with the single exception of the decision below, have similarly recognized that § 406 only regulates fiduciary conduct. *See, e.g.*, *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995) ("The scope of ERISA's fiduciary duties is outlined in [29 U.S.C.] sections 1104 and 1106. . . ."); *Johnson*, 19 F.3d 1184 (plan amendment which increased pension benefits does not constitute prohibited transaction); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (rejecting plaintiffs' prohibited transaction argument as "patently inapplicable to the

facts of this case"), *cert. denied*, 481 U.S. 1016 (1987); *Amato*, 773 F.2d at 1417 (plan amendment which decreased pension benefits does not constitute prohibited transaction).

The structure of ERISA also demonstrates that § 406 was intended to regulate fiduciary conduct, rather than restrict the plan sponsor's ability to amend the plan to create new benefits. Section 406 is contained in Part 4 of Subchapter I, Subtitle B, of ERISA. Part 4 is entitled "Fiduciary Responsibility," and sets forth the standards governing fiduciary conduct for both pension and welfare plans. It would make little sense to include § 406 in Part 4 unless it were intended to regulate fiduciary conduct. Non-fiduciary conduct, such as amending a plan to increase benefits, cannot therefore constitute a prohibited transaction under § 406.

Notwithstanding the language and placement of § 406, and contrary to the decisions of the other circuits, the court below held that Lockheed engaged in a prohibited transaction when it amended the Plan to provide additional retirement benefits conditioned upon various eligibility criteria including the execution of a release of claims. Significantly, the Ninth Circuit did not identify any fiduciary who breached a duty, nor did it identify any fiduciary conduct within the scope of ERISA § 3(21)(A). Instead, the court of appeals attempted to sidestep this issue by stating in a footnote that it did not need to decide the issue of whether "an employer acts as a fiduciary when it amends the plan in a way that affects plan assets." J.A. at 88 n.5. This issue cannot be sidestepped, however, since both the language and placement of § 406 confirm that it regulates fiduciary conduct. Unless Lockheed acted as a fiduciary when it amended the Plan, Lockheed and the Plan's trustees (who are fiduciaries) could not engage in a prohibited transaction, or otherwise breach their fiduciary duties, when they

administered the amended Plan in accordance with its terms and paid increased benefits to participants. The district court, by contrast, directly addressed the issue of whether amending the Plan was a fiduciary act and held that it was not. J.A. at 68-69.

The Seventh Circuit in *Johnson* rejected a "prohibited transaction" argument virtually identical to the one accepted in the decision below, holding that no prohibited transaction could occur because none of the actions in question, including both the plan amendment and administration of the plan in conformity with that amendment, "transferred, sold, exchanged, or otherwise affected any asset of the plan." 19 F.3d at 1189. Contrary to the decision below, the Seventh Circuit correctly held that the plan sponsor's decision to amend the plan to create additional pension benefits cannot be a prohibited transaction as a matter of law, because amending the plan is a settlor function rather than a fiduciary act.[12] *See also* H. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5097 ("It is not a prohibited transaction for a plan to distribute its assets in accordance with the provisions of the plan. . . .")

In addition, it strains the language of § 406 to characterize a plan amendment as a "transaction" of any type, much less one that is prohibited. Rather, § 406 prohibits the plan fiduciaries from transferring money from the plan to the plan sponsor, whether through purchases, sales, loans, or other "transactions." Amending the plan to provide new pension benefits simply does not fall within

[12] The Ninth Circuit's misreading of the applicable law is exemplified by its citation to its prior decision in *M&R Investment Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982), as "holding that a plan amendment" violated a different prohibition in ERISA § 406. J.A. at 90. In fact, *M&R Investment Co.* involved a loan (which clearly is a "transaction"), and *not* a plan amendment.

the ambit of a "transaction" under § 406, in addition to being outside the scope of fiduciary conduct as defined in ERISA § 3(21)(A). *See, e.g.*, *Amato*, 773 F.2d at 1417 (§ 406 does not apply to plan amendments, but instead regulates "a transaction between the plan and a party having an adverse interest").

In attempting to rationalize its prohibited transaction holding, the decision below characterized one of the eligibility requirements for the voluntary retirement window program -- that a release be signed by the retiree as a condition of receiving additional benefits -- as a "purchase" of releases with the use of Plan assets. J.A. at 87. This "purchase" analogy, however, only emphasizes the absence of any unlawful fiduciary conduct. If the Plan fiduciaries had paid money from the Plan to persons who were not Plan participants or beneficiaries to settle lawsuits against Lockheed, they would, as the opinion below suggests, have violated ERISA § 406(a)(1)(D). But that is not what happened. The fiduciaries of Lockheed's Plan did not transfer assets to Lockheed, nor did they use Plan assets to pay third parties who had asserted claims against Lockheed. Instead, Plan assets were used solely to pay additional benefits to participants who satisfied the conditions of the voluntary retirement window, *pursuant to the amended terms of the Plan*. This cannot be a prohibited transaction within the meaning of ERISA. If Congress had intended to outlaw certain payments of plan assets to participants as pension benefits in the prohibited transaction rules set out in § 406, it certainly could have done so. But it did not.

The Ninth Circuit's holding that § 406 applies to plan amendments is also inconsistent with Congress' purpose in enacting § 406. As recognized by this Court, "Congress' goal was to bar categorically a *transaction* that was likely to injure the pension

plan." *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 113 S. Ct. 2006, 2012 (1993) (emphasis added). To further this goal, Congress created a "bright-line" test which flatly prohibits certain transactions without permitting any examination of the "reasonableness" of a particular transaction to the plan. This was a substantive change in the law, since prior to ERISA an "arm's-length" transaction between the plan and plan sponsor was lawful. *Keystone*, 113 S. Ct. at 2012. The rule adopted in the decision below is the antithesis of the bright-line test which Congress adopted in ERISA: it would prohibit pension plan amendments only if they create a "significant benefit" for the plan sponsor, J.A. at 91, thus creating the potential for virtually endless litigation as to whether a particular amendment produces any benefit for the plan sponsor and, if so, whether the benefit is "significant." This is directly contrary to Congress' goal of drafting § 406 to avoid the need for such an inquiry. Expanding § 406 to apply to plan amendments would, therefore, run contrary to the legislative purpose that underlies § 406.[13]

[13] Expanding § 406 liability in this fashion also deviates from the approach taken in this Court's prior decisions which have "emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063, 2066-67 (1993), quoting *Massachusetts Mutual Life Ins. Co.*, 473 U.S. at 146-47 (emphasis in original).

C. Conditioning The Payment Of Increased Pension Benefits Upon The Execution Of A Release Was Expressly Approved By Congress In Its 1990 Amendments To The ADEA And Is Consistent With Common, Well-Established Business Practices.

The holding of the decision below – invalidation as a prohibited transaction under ERISA of the waiver agreements used in connection with window programs providing enhanced retirement benefits – declares illegal a longstanding and widespread practice. Numerous employers throughout the nation have in the past offered exit incentive programs, which in many cases condition benefits upon a release of claims.[14] The Ninth Circuit's invalidation of this common practice is not only an incorrect interpretation of ERISA, but also impossible to reconcile with the ADEA, the federal law that most directly speaks to waivers in the context of voluntary retirement incentive programs.

[14] A 1989 report prepared by the General Accounting Office ("GAO") showed that 80 percent of the companies listed in the Fortune 100 had offered some sort of exit incentive program (such as a "window" program) in the prior ten years, and that 55 percent of a sample of employers of 25,000 or more employees had sponsored such a program between 1981 and 1985. *See* General Accounting Office, *Use of Waivers by Large Companies Offering Exit Incentives to Employees*, GAO/HRD 89-87 at 2 (1989). Of employers that sponsored exit incentive programs, over 70 percent offered enhanced early retirement benefits under the company's pension plan, either alone or in combination with non-plan benefits. *Id.* at 4-5. This trend in usage of early retirement programs has continued into the 1990's. *See* General Accounting Office, *Downsizing Strategies Used in Selected Organizations*, GAO/GGD 95-54 (1995) (reporting that 17 of 25 large organizations that had undergone downsizing efforts (including 17 major corporations, 5 state governments, and 3 foreign governments) had provided early retirement programs); *see also* Hewitt Associates, *Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans* (1992) (reporting that 186 companies from a survey of approximately 700 companies had offered early retirement window programs between 1988 and 1992 and that 56 of these companies had offered more than one such program).

In 1990, Congress amended the ADEA by enacting the Older Workers' Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990), which expressly contemplates the use of employee waivers in conjunction with voluntary retirement window programs like that implemented by Lockheed. *See* S. Rep. No. 101-79, 101st Cong., 1st Sess. 3-17 (1989). Indeed, the ADEA sets forth criteria that apply when the waiver is sought in connection "with an exit incentive or other employment termination program," which encompasses programs like the one sponsored by Lockheed. 29 U.S.C. § 626(f)(1)(H). *See also* S. Rep. No. 101-263, 101st Cong., 2d Sess. 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1538 (the "trademark of voluntary reduction programs is a standardized formula or package of benefits designed to induce employees voluntarily to sever their employment"). It would be most peculiar if Congress's efforts in 1990 to define the scope of permissible ADEA waivers were rendered meaningless because such waivers are flatly banned by ERISA, yet that is the effect of the decision below.

If the Ninth Circuit's decision is affirmed, it would not only invalidate this practice, which was expressly authorized by Congress, but would also logically apply to a wide range of ordinary business practices heretofore never thought to constitute unlawful prohibited transactions or breaches of fiduciary duty. Employers routinely create or amend their pension plans (as opposed to raiding and using a plan's assets) to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases. Indeed, Treasury regulations expressly recognize that

employers may require employees to agree to reduced wage compensation in exchange for the right to participate in a pension plan. *E.g.*, Treas. Reg. § 1.401(k)-1(a)(3)(iv). Substantial wage reductions for a cash-strapped employer can hardly be viewed as an insignificant or incidental benefit, yet it would be unlawful under the Ninth Circuit's analysis. All of these practices and many others provide substantial benefits to the employer. Of course, that is their very purpose. Until the decision below, however, no court ever suggested that these common employer practices were illegal "purchases" made with plan assets. *See* Taxes, *supra*, at 605.

Enticing employees voluntarily to retire for additional retirement benefits conditioned upon a release of employment-related claims against their employer obviously serves a corporate purpose. But just as an employer may amend its pension plan to increase retirement benefits to end a strike, substitute as a wage increase, or partially offset a wage reduction, the employer is not taking and using plan assets in a prohibited transaction or engaging in any other fiduciary breach when it amends its plan to increase benefits to encourage voluntary retirement. Voluntary retirement windows serve a useful social purpose -- retirement with income is preferable to layoff without income -- as recognized by Congress when it enacted the OWBPA. *See* S. Rep. No. 101-263, 101st Cong., 2d Sess. 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1557 ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . ."); *Siskind, supra*, 47 F.3d at 500-01 ("Providing early retirement incentives rather than full-scale layoffs is less costly to the employer and also less traumatic to employees facing the loss of their jobs."). For this reason, the Ninth Circuit's

decision would be disruptive to both employers and employees alike if permitted to stand.

Decisions of several circuit courts have either not questioned under ERISA, or upheld the validity of, releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[15] In addition, the Treasury Department has adopted regulations which expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers so long as nondiscrimination and vesting requirements are satisfied. *See* Treas. Reg. § 1.401(a)(4)-4(b)(2)(ii)(B) (nondiscrimination rules are not violated if pension benefits are conditioned upon various eligibility criteria, including the "execution of a waiver of rights under the Age Discrimination in Employment Act or other federal or state law . . ."); Treas. Reg. § 1.411(a)-4(c), Example (1) (certain pension benefits may be conditioned upon the participant's agreement not to accept employment with competitors of the plan sponsor); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1) (same); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an

[15] *See, e.g.*, *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995) (enforcing release in exchange for severance pay and extended participation in various ERISA plans); *Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993) (enforcing release in exchange for ability to participate in enhanced benefits severance plan); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988) (enforcing release in exchange for an enhanced retirement package and special payment allowance). *See also Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988) (participation in severance plan conditioned upon execution of a release of claims does not violate ERISA).

early retirement window plan).[16] By applying fiduciary standards to a plan amendment which promises greater benefits, and characterizing the release requirement upon which the promise is conditioned as a "prohibited transaction," the decision below has achieved a result that jeopardizes plan amendments which increase benefits. This creates great uncertainty for plan sponsors and fiduciaries, and is inconsistent with both Treasury regulations and the law of every other circuit to consider the issue. The decision should therefore be reversed, and the district court's dismissal of Count III of the Complaint should be reinstated.

II. THE DECISION BELOW CONFLICTS WITH THE COURT'S DECISION IN *LANDGRAF V. USI FILM PRODUCTS* BY HOLDING THAT OBRA 1986 HAS RETROACTIVE APPLICATION DESPITE THE ABSENCE OF ANY "CLEAR CONGRESSIONAL INTENT" TO THAT EFFECT.

The decision below also held that the substantive change in the law contained in OBRA 1986 must be given retroactive effect so that employers would be compelled to grant benefit accrual for service *before* employees became participants in their employers' pension plans. J.A. at 80. In respondent's individual case, this means that Lockheed is required retroactively to grant him pension benefit credit for all years since he was hired in 1979, *even though he did not become a Plan participant until 1988*. As acknowledged

[16] The IRS has also ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* T.A.M. 9516005 (Dec. 22, 1994) (although employer "derives an incidental benefit from the use of Plan . . . assets to pay the obligation," no prohibited transaction occurs because "the direct beneficiaries of this use of plan assets are certain Plan . . . participants and their beneficiaries . . .").

by the Ninth Circuit, its holding retroactively imposes additional obligations upon pension plan sponsors by requiring benefits to be calculated on the basis of employment service which predates the enactment of OBRA 1986. J.A. at 82 n.1.

In *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), this Court held that when deciding whether a statute applies retroactively, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." 114 S. Ct. at 1505. In the absence of an "express command" from Congress concerning retroactivity, the proper default rule is that a statute is presumed to apply prospectively, and the statute will not be applied retroactively "absent clear congressional intent favoring such a result." *Id.*

Landgraf emphasizes that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 114 S. Ct. at 1497. This stems from the closely related notions that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Id.* The principle against retroactive application of statutes is reflected in several Constitutional provisions, including the Due Process and Takings Clauses of the Fifth Amendment. *Id.* Although these constitutional provisions do not rise to the level of creating a *per se* rule against retroactive civil legislation, they do support "a requirement that Congress first make its intention clear," which in turn "helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 1498.

In this case, the "settled expectations" of plan sponsors throughout the nation would be radically disrupted if the Ninth Circuit's holding of retroactivity is permitted to stand. One *amicus curiae* estimates that the retroactive application of OBRA 1986 would result in additional pension liabilities of $1.7 billion on a nationwide basis. Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 29. There is nothing in either OBRA 1986 or its legislative history, however, to justify a conclusion that Congress intended to impose this substantial obligation upon plan sponsors. The Ninth Circuit's contrary conclusion is unsupported for the reasons described below.

A. The Changes In The Pension Benefit Accrual Rule Which Were Made By OBRA 1986 Show That Congress Addressed Two Distinct Issues: Exclusion Of Employees Over Age 60 When Hired, And Pension Benefit Accrual For Employees Who Worked Past Normal Retirement Age.

By holding OBRA 1986 to apply retroactively, the court of appeals erroneously imposed substantial additional pension liabilities upon Lockheed as well as numerous other employers without any statutory language that compels such a result. Indeed, as the district court observed, the relevant effective date provisions of OBRA 1986 are "*prospective* and thus do not provide [respondent] the grounds to participate retroactively for periods of service prior to joining the Plan . . . nor to receive retroactive benefit accrual." J.A. at 65 (emphasis in original). The error of retroactive application is apparent when the substantive changes made by OBRA 1986 are considered alongside the effective date language.

Prior to OBRA 1986, both ERISA and the ADEA recognized two different rules that permitted pension plans to distinguish between older and younger employees. For convenience, petitioners will refer to one rule as the "Age 60 Exclusion Rule" and the other rule as the "Post-NRA Accrual Cessation Rule," where "NRA" refers to normal retirement age.

The Age 60 Exclusion Rule refers to the fact that prior to OBRA 1986 both ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2), and § 410(a)(2) of the Internal Revenue Code, 26 U.S.C. § 410(a)(2), allowed employees hired within five years of the age specified by the plan as the "normal retirement age" to be excluded from participating in a pension plan.[17] Because most plans defined normal retirement age as 65, this brief refers to this rule as the Age 60 Exclusion Rule. The Age 60 Exclusion Rule was eliminated by § 9203 of OBRA 1986.

The second rule, referred to above as the Post-NRA Accrual Cessation Rule, permitted plans to cease accruals of pension benefits for years of participation after a participant attained normal retirement age. Thus, even if an older employee had become a participant in a pension plan, it was still lawful for the plan to provide that no further benefit accrual would be made on his or her behalf under the plan after attainment of normal retirement age.

Unlike the statutory basis for the Age 60 Exclusion Rule, the basis for the Post-NRA Accrual Cessation Rule rested in the

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[17] In Lockheed's case, this meant that employees hired at age 60 or older could lawfully be excluded from the Plan. Such a provision was in fact included within Lockheed's Plan at § 2.01(C) and operated to exclude respondent from participation prior to 1988. J.A. at 58.

legislative history of the 1978 amendments to the ADEA.[18] This legislative history caused the Department of Labor to promulgate an interpretation of the ADEA that allowed the Post-NRA Accrual Cessation Rule. 43 Fed. Reg. 43,264 (1978). From the time of its promulgation the Post-NRA Accrual Cessation Rule was attacked as an incorrect administrative interpretation of the ADEA.[19] The EEOC's failure to repeal the rule eventually led to litigation challenging the rule, which was ongoing at the time Congress considered and passed OBRA 1986.

Sections 9201 and 9202 of OBRA 1986 eliminated the Post-NRA Accrual Cessation Rule. Section 9201 of OBRA 1986 amended the ADEA to make it unlawful for an employer to maintain a pension plan "which requires or permits – (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . ." 29 U.S.C. § 623(i)(1). Section 9202 of OBRA 1986 made parallel amendments to ERISA, 29 U.S.C. § 1054(b)(1)(H)(i) (1988), and the Internal Revenue Code, 26 U.S.C. § 411(b)(1)(H)(i).

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[18] This legislative history is summarized in the initial district court decision in *Bell v. Trustees of Purdue University*, 658 F. Supp. 184, 187-189 (N.D. Ind. 1987), *remanded*, 845 F.2d 1023 (7th Cir. 1988), *on remand*, 761 F. Supp. 1360 (N.D. Ind. 1991), *aff'd*, 975 F.2d 422 (7th Cir. 1992).

[19] As recounted in *AARP v. EEOC*, 655 F. Supp. 228 (D.D.C.), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987), the EEOC (which succeeded the DOL as the agency with enforcement authority over the ADEA) went through a series of gyrations beginning in 1980 with respect to whether the DOL's interpretation should be repealed. 655 F. Supp. at 233-34.

B. The Plain Language Of OBRA 1986 Provides That The New Benefit Accrual Rules Apply Prospectively.

The key change effected by OBRA 1986 for respondent is that he first became a participant in Lockheed's Plan on December 25, 1988. This was required by § 9203 of OBRA 1986, which abolished the Age 60 Exclusion Rule and which was effective "only with respect to plan years beginning on or after Janaury 1, 1988 and only with respect to service performed on or after such date." OBRA 1986 § 9204(b). The Ninth Circuit acknowledged both that this change in the law had prospective application only, *i.e.*, it does not require retroactive participation, and that ERISA requires pension benefit accruals to be based upon years of participation. J.A. at 85-86; *see also* 29 U.S.C. § 1054(b)(1)(C). Based upon these principles, it would seem relatively straightforward to conclude that Lockheed satisfied OBRA 1986 by making respondent a Plan participant on December 25, 1988, at which point he began to accrue pension benefits at the same rate as any other participant as required by §§ 9201 and 9202.

Rather than simply acknowledge that the repeal of the Age 60 Exclusion Rule, on a prospective basis, controls the outcome of the lawsuit, the Ninth Circuit instead based its decision upon a retroactive application of §§ 9201 and 9202 which abolished the Post-NRA Accrual Cessation Rule. Even if the repeal of the Post-NRA Accrual Cessation Rule were retroactively applied, however, it is of no benefit to respondent because he was not a Plan participant. Moreover, §§ 9201 and 9202 do not provide any basis for concluding that respondent is entitled to retroactive pension benefit accrual for years prior to 1988. This is because OBRA 1986 expressly provided that the abolition of the Post-NRA Accrual

Cessation Rule was not to take effect until on or after January 1, 1988. There is no hint of retroactivity in this statutory language:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), codified at 29 U.S.C. § 623 note. The district court concluded that the "plain language" of this statute compelled the conclusion that sections 9201 and 9202 did not apply retroactively. J.A. at 65. The district court's decision preceded *Landgraf* but its conclusion is fully consistent with it, 114 S. Ct. at 1493 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."). The district court further held that because respondent was not a Plan participant prior to December 25, 1988, he did not accrue any pension benefit credit prior to that date. J.A. at 65.

By contrast, the court of appeals held that the "most natural reading" of the same statutory language compelled the conclusion that "pre-enactment service years must be included in benefit accrual calculation;" *i.e.*, that the statute "applies retroactively." J.A. at 81 & 82 n.1. This reasoning seriously misreads the plain language of the statute, however, because it confuses the concepts of (1) the "rate of an employee's benefit accrual" (as used in sections 9201 and 9202) with (2) the total benefit accrued.

The court of appeals' error is best illustrated by the deceptively simple, yet illogical, syllogism used in its opinion. After correctly noting that the OBRA 1986 amendments forbid age-based reductions in "the rate of benefit accrual," J.A. at 81-82, the court stated:

> Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.

J.A. at 82.

It is true, of course, that respondent's entirely lawful exclusion from the Plan for nine years meant that he had no accrued benefits as of December 25, 1988, since no benefit is provided for employees who were never participants. But § 9202 does not refer to an individual's total accrued benefits. Instead, § 9202 forbids age-based distinctions in the *rate* at which employees accrue benefits; *i.e.*, the plan must accrue benefits at the same rate for all participants regardless of age. A "rate of benefit accrual" differs from the concept of total accrued benefits in the same way that a vehicle's speed in miles per hour differs from the total miles travelled.[20]

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[20] This is illustrated as follows: Assume that respondent's final compensation were $50,000 a year, that the Plan had a 1.5% of final compensation times years of participation formula, and that respondent would have had nine years of participation on December 25, 1988, if Lockheed had never adopted the Age 60 Exclusion Rule. (This is basically the Lockheed Plan's formula without certain calculations not relevant here.) Using these assumptions, it may be seen that the (continued...)

If OBRA 1986 is applied prospectively, then once respondent became a participant he would commence accruing benefits *at exactly the same rate* as the other participants upon its effective date, with neither a cessation of benefit accruals nor a reduction in the rate of his accrual. This would completely satisfy both sections 9201 and 9202. The decision below nonetheless found this interpretation of OBRA 1986 to be untenable because it would lead to "discriminatory effects," since respondent would receive no pension credit for his pre-1988 employment with Lockheed and thus would receive a smaller pension than if he were given such credit. J.A. at 83. This, however, is circular reasoning. The so-called "discriminatory effects" are simply the result of prospectively applying a new statute that expanded the concept of age discrimination. The Ninth Circuit's rationale runs directly contrary to *Landgraf*, because under the Ninth Circuit's reasoning any expansion in the scope of the employment discrimination laws would have to be applied retroactively in order to avoid similar "discriminatory effects." This not only contradicts

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[20] (...continued)
controversy between respondent (and the putative class he seeks to represent) and Lockheed concerns the amount of his accrued benefit under the Plan on December 25, 1988, when he commenced participation. Respondent asserts that this accrued benefit is $6,750 (nine years times .015 times $50,000). Lockheed asserts that the accrued benefit is $0 (zero years times .015 times $50,000). Neither party disputes, however, that respondent's *rate of benefit accrual* became 1.5% with respect to future service, i.e., service from December 25, 1988, onward. The dispute relates only to the amount of accrued benefits that should be credited to respondent (and similarly situated employees) as of his first day of participation in the Plan, for years of service when he was *not* a participant in the Plan. To be sure, years of participation is also part of the benefit formula and if years of participation for older workers were not counted or weighed equally as years of participation for younger workers, an ADEA and ERISA violation would occur. But there is no such distinction in Lockheed's Plan. All years of participation of participants of any age are treated equally for calculating each participant's accrued benefit. Respondent's argument below that the calculation of his accrued benefit is less favorable because of his age is simply incorrect.

the holding of *Landgraf*, but also the pre-*Landgraf* decisions which held that previous amendments to the ADEA and Title VII of the Civil Rights Act of 1964 were to have prospective application only. 114 S. Ct. at 1493 n.10.

The decision below fails to acknowledge that the statutory language does *not* state that the new benefit accrual rule should be applied retroactively; instead, § 9204(a)(1) states that the new rule is to be applied "only with respect to plan years beginning on or after January 1, 1988, . . ." This language plainly contemplates prospective application of the new benefit accrual rule. The court of appeals' contrary interpretation simply is not supported by the statutory language, and no part of the statute states that OBRA 1986 is to be applied retroactively.

An additional flaw in the decision is that it deprives the companion effective date provision of OBRA 1986 – § 9204(b) – of any rational meaning, thus violating a basic canon of statutory interpretation. 2A Singer, *Sutherland Statutes and Statutory Construction* § 46.06 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."). Section 9204(b) contains the effective date for § 9203 of OBRA 1986, which repealed the Age 60 Exclusion Rule. Although the Ninth Circuit acknowledged § 9204(b) provides for prospective application of § 9203, J.A. at 85, its holding that § 9202 applies retroactively leaves § 9204(b)'s prospective effective date with no rational meaning, because years of participation are significant essentially only when calculating benefit accrual. The Ninth Circuit's inability to advance *any* meaning for § 9204(b)'s prospective effective date in light of its interpretation of § 9204(a) is further proof of the error of its analysis. If Congress had intended to provide retroactive

benefit accrual for employees for the periods prior to the date they became plan participants, it could have expressly done so and would certainly not have included § 9204(b) as part of OBRA 1986.

C. The Use Of Different Language To Confirm Prospective Application In Section 9204(b) Does Not Create A Negative Inference That Section 9204(a)(1) Applies Retroactively.

The court of appeals also incorrectly concluded that because the effective date language in § 9204(a)(1) differed slightly from that of § 9204(b), § 9204(a)(1) should be read to require retroactivity. This reasoning also fails to survive scrutiny.

Landgraf holds that "negative inferences" made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity. *Landgraf*, 114 S. Ct. at 1493. The issue arose in *Landgraf* because Congress had expressly declared that two discrete sections of the Civil Rights Act of 1991 were to be given prospective effect. From that, the petitioner argued that the rest of the 1991 Act should be applied retroactively, since otherwise the express language commanding prospective application of the two specific sections would be "superfluous." *Id.* This Court rejected that argument, since it placed "extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute." *Id.* Given the serious consequences that would result from retroactivity, the Court declared that "it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect." *Id.* at 1493-94.

The decision below erred on this point because it failed to recognize that Congress had other reasons for using slightly different effective date language in § 9204(a)(1) and § 9204(b). While no one had suggested that the Age 60 Exclusion Rule violated the ADEA at the time OBRA 1986 was enacted, pending litigation sought to overturn the Post-NRA Accrual Cessation Rule. *Supra* at 33. Congress was well aware of this controversy, and responded by attempting to leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) in the then-ongoing litigation by using slightly different effective date language in § 9204(a).[21]

There was absolutely no controversy, however, with respect to the legality of excluding from pension plans the thousands of employees (such as respondent) who were hired within five years of normal retirement age, because ERISA and the Internal Revenue Code expressly permitted this practice. Since no dispute existed on this issue, Congress adopted slightly different prospective date language in § 9204(b), stating that the abolition of the Age 60 Exclusion Rule would apply "only with respect to service performed on or after [the effective] date." 100 Stat. 1980 (1986). Had Congress used the same language in § 9204(a)(1), it could have been viewed by courts as evidence that the Post-NRA Accrual Cessation Rule was the correct interpretation of the ADEA under *pre*-OBRA 1986 law. Because Congress decided to leave this issue unresolved, 132 Cong. Rec. 32,975 (October 17, 1986)

[21] The Conference Report for OBRA 1986 acknowledged this controversy by stating that "[d]isagreement exists as to whether and to what extent benefit accruals . . . are required under ADEA, as currently in effect." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023.

(remarks of Representative Clay), it used different effective date language in § 9204(a)(1).

The Ninth Circuit's reading of this slightly different language as evidence of an unspoken intent to require retroactive pension benefit accrual for non-participants' pre-1988 employment is incorrect, because Congress could have mandated retroactivity through express statutory language had it sought to do so. *Landgraf*, 114 S. Ct. at 1495 (rejecting petitioner's "negative inferences" argument because it "would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases").[22] Imposition of such retroactive liability exceeding $1 billion on plans and plan sponsors throughout the nation, who for years lawfully excluded many thousands of employees from plan participation, cannot fairly be implied from congressional silence.

[22] The same reasoning also demonstrates why the Ninth Circuit's reliance upon the maxim that "when Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply," J.A. at 84, was misplaced. *See also Landgraf*, 114 S. Ct. at 1494 (rejecting petitioner's *expressio unius* argument on the ground that if Congress had intended to mandate retroactivity, it would have used language expressly requiring that result).

D. The Internal Revenue Service, Which Is The Agency Charged With The Enforcement Of OBRA 1986, Has Interpreted Sections 9201 And 9202 To Have Prospective Application Only With Respect To Individuals Such As The Respondent Who Were Not Plan Participants Before OBRA 1986.

The Ninth Circuit's decision is wrong for the additional reason that it conflicts with the interpretation of the IRS, the agency charged with enforcement of OBRA 1986. The IRS announced, in 1988, that it would interpret OBRA 1986 as having only prospective effect with regard to benefit accruals for the thousands of employees who first became eligible to participate in a plan following enactment of OBRA 1986:

> In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, . . . *hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.*

Preamble to Prop. Treas. Reg. § 1.411(b)-2, 53 Fed. Reg. 11876, 11877 (1988) (emphasis added).[23] The same rule is stated in the text of the Proposed Regulation itself:

> [A] defined benefit plan is not required under [I.R.C.] section 411(b)(1)(H) [which corresponds to 29 U.S.C. §§ 623(i)(1) and 1054(b)(1)(H)(i)] and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan.

Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii), 53 Fed. Reg. 11876, 11884 (1988). Respondent has conceded in this Court that the Proposed Regulation supports Lockheed's position as to his circumstances. Respondent's Brief In Opposition To Petition For A Writ Of Certiorari at 27.

As the agency charged with administering OBRA 1986, the IRS interpretation of the statute is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). The court of appeals refused to defer to these expert administrative views, however, because the IRS's proposed regulation has not yet been finalized, declaring that "we need not accord deference to [the IRS's] proposed interpretations." J.A. at 87 n.3. This ignores the special fact present here, however, that the IRS had previously announced that its final regulations implementing OBRA 1986 will follow the Proposed Regulation on this point. The IRS stated, in relevant part:

[23] Section 9204(e) of OBRA 1986 required the Secretary of the Treasury to adopt final regulations no later than February 1, 1988. 100 Stat. 1980 (1986).

> The final regulations to be issued by the IRS under section 411(b)(1)(H) of the Code *will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under noncontributory defined benefit plans*. Thus, the final regulations to be issued by the IRS will provide that the OBRA 1986 benefit accrual rules apply to all years of service (including years of service before January 1, 1988) completed by a *participant* in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988.

IRS Notice 88-126, 1988-2 C.B. 538 (1988) (emphasis added).[24] The IRS also stated that the proposed regulation constitutes an "administrative pronouncement" which "may be relied upon to the same extent as a revenue ruling or revenue procedure" and that "[t]axpayers may rely on this notice until the final regulations are published." *Id.* Thousands of taxpayers, including Lockheed, have in fact relied upon this IRS pronouncement since 1988. Indeed, Lockheed specifically relied upon the Proposed Regulation in determining respondent's pension benefit and its chairman so advised respondent in writing. J.A. at 34-35. Because IRS revenue rulings are generally accorded deference in interpreting a statute that the IRS is charged with administering, *Bob Jones University v. United States*, 461 U.S. 574, 596 (1983), the IRS's

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[24] Respondent has incorrectly argued that IRS Notice 88-126 represented a substantive change in the IRS interpretation of OBRA 1986, claiming that it adopts a rule that persons such as respondent, who were not pension plan participants prior to OBRA 1986, were entitled to retroactive benefit accrual. Respondent's Brief In Opposition To Petition For A Writ Of Certiorari at 28. This plainly misreads the initial sentence in the portion of Notice 88-126 which is quoted above.

interpretation of OBRA 1986 as having prospective application only should be considered and given weight. *See Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (directing the court of appeals to consider the views of the IRS, because "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass'") (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

E. The Legislative History Provides No Evidence That Congress Intended Sections 9201 And 9202 To Apply Retroactively.

The court of appeals also relied upon the legislative history of OBRA 1986 for its conclusion that the statute should apply retroactively. Specifically, the court observed that the pre-conference Senate version of the bill that became OBRA 1986 provided that the new accrual rule would be "effective with respect to employees who are employed after December 31, 1988, with respect to accrual computation periods beginning after December 31, 1986." H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4022. This language, which would have imposed retroactive benefit accrual for a limited time period not to exceed two years, was changed in conference, and the conference report gives the following explanation for adopting the language currently found in § 9204(a)(1):

> *Effective date*. -- The conference agreement clarifies that the amendments apply to plan years beginning on or after January 1, 1988. Such amendments do not apply with respect to any employee who does not have an hour of

service in any plan year to which the amendments apply. . . .

H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 4027.

The court of appeals characterized the conference committee change as a "rejection" of the original Senate language, and interpreted this as a desire by Congress to make the new pension benefit accrual requirement fully retroactive. J.A. at 84-85. This reasoning is unsound, because the House bill that became OBRA 1986 did not propose to repeal either the Post-NRA Accrual Cessation Rule or the Age 60 Exclusion Rule. The Senate initially proposed only that repeal take effect for accrual computation periods beginning after December 31, 1988, at which time participants could receive retroactive benefit accrual for a limited period of up to two years. It would be astounding for the conference committee to intend this "clarification" of the effective date language to radically change the Senate amendment and impose upon employers an unlimited obligation to retroactively accrue pension benefits for pre-1988 employment, when such an obligation had never been contemplated by either the House or the Senate prior to conference. *See Landgraf*, 114 S. Ct. at 1492 ("[t]he omission of the elaborate retroactivity provision of [a prior version of the] bill . . . is not dispositive because it does not tell us precisely where the compromise was struck in the [final legislation]"). Instead, a far more reasonable interpretation is that Congress decided to eliminate the limited two-year period of retroactivity provided in the pre-conference Senate bill and instead replace it with a provision for prospective application only.

The Ninth Circuit's analysis of the legislative history is also defective because it fails to acknowledge other portions of the legislative history which expressly disavow the theory that OBRA 1986 compelled retroactive benefit accrual. For example, Representative Clay, the Chairman of the House Subcommittee on Labor-Management Relations of the Committee on Education and Labor, confirmed that OBRA 1986 should not be applied retroactively:

> My subcommittee heard testimony last year on this subject and was convinced that congressional action was needed to provide *prospective guidance to employers*. Despite the fact we are amending the law today, Congress does not intend any inference to be drawn as to whether and to what extent additional accruals and allocations might be required under current law. *Regardless of what current law requires, [OBRA 1986] requires such accruals and allocations in the future in most instances.*

132 Cong. Rec. 32,975 (October 17, 1986) (emphasis added).

Under *Landgraf*, statutes are not to be applied retroactively absent clear evidence in the statute itself that Congress so intended. There is no such evidence here; instead, both the text of the statute and the legislative history are to the contrary. In the absence of any evidence to support retroactive application, and because retroactive benefit accrual would result in an unanticipated retroactive liability to pension plans nationwide exceeding $1 billion, the decision below should be reversed, and the district court's dismissal of Counts I and II of the Complaint should be reinstated.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to reverse the decision of the Ninth Circuit, and remand the case with instructions to affirm in all respects the decision of the district court.

DATED: February 28, 1996.

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No. 95-809

In the Supreme Court of the United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, ET AL., PETITIONERS

v.

PAUL L. SPINK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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36 P 17

QUESTIONS PRESENTED

1. Whether an employer's amendment of a pension plan, to provide for enhanced early retirement benefits, conditioned upon the employee's waiver of any claims the employee may have against the employer "arising from termination of employment or otherwise," constitutes a "prohibited transaction" within the meaning of Section 406 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1106.

2. Whether the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986) requires a plan that lawfully denied the right to participate to employees who were 60 or older when hired (before OBRA 1986 became effective) to take into account for benefit accrual purposes the years of service in which those employees were lawfully excluded from participation.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	6
Argument:	
I. Lockheed's Amendment of the Plan did not itself constitute a prohibited transaction in violation of Section 406(a) (1) (D) of ERISA	8
II. OBRA 1986 does not require an employer to consider for purposes of benefit accrual years of service in which an employee was lawfully excluded from participating in a pension plan because of his age	22
Conclusion	29

TABLE OF AUTHORITIES

Cases:

AARP v. *EEOC*, 655 F. Supp. 228 (D.D.C.), rev'd, 823 F.2d 600 (D.C. Cir. 1987)	26
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)	10
Central States, Southeast & Southwest Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985)	13
Commissioner v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006 (1993)	9
Curtiss-Wright Corp. v. *Schoonejongen*, 115 S. Ct. 1223 (1995)	9, 13
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953)	11
Johnson v. *Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994)	20
Joseph Schlitz Brewing Co. v. *Milwaukee Brewery Workers*, 3 F.3d 994 (7th Cir. 1993), aff'd, 115 S. Ct. 981 (1995)	10
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	24

Cases—Continued: Page

Lieberman v. *Becker*, 155 A.2d 596 (Del. 1959) 10
M & R Investment Co. v. *Fitzsimmons*, 484 F. Supp. 1041 (D. Nev. 1980), aff'd, 685 F.2d 283 (9th Cir. 1982) 8
Moore v. *Reynolds Metals Co. Retirement Plan*, 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985) 10
Musto v. *American General Corp.*, 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) 10
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 11
Nazay v. *Miller*, 949 F.2d 1323 (3d Cir. 1991) 10
New York State Conf. of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995) 16
Noell v. *American Design Inc.*, 764 F.2d 827 (11th Cir. 1985) 21
Reich v. *Compton*, 57 F.3d 270 (3d Cir. 1995) 5
Reich v. *Rowe*, 20 F.3d 25 (1st Cir. 1994) 5
Reich v. *Stangl*, 73 F.3d 1027 (10th Cir. 1996) 5
Siskind v. *Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995) 10
Sutter v. *BASF Corp.*, 964 F.2d 556 (6th Cir. 1992) 11

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2
§ 4(i)(1), 29 U.S.C. 623(i)(1) 3, 26
§ 7(f)(1), 29 U.S.C. 626(f)(1) 22
§ 7(f)(1)(H), 29 U.S.C. 626(f)(1)(H) 22
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 1, 2
Tit. I, 29 U.S.C. 1001-1169 ..... 2, 16
§ 3(6), 29 U.S.C. 1002(6) 15
§ 3(14)(C), 29 U.S.C. 1002(14)(C) 8, 12, 15
§ 3(14)(D), 29 U.S.C. 1002(14)(D) 8
§ 3(14)(H), 29 U.S.C. 1002(14)(H) 8, 15

Statutes and regulations—Continued: Page

§ 3(21)(A), 29 U.S.C. 1002(21)(A) 9, 12
§ 202(a)(2), 29 U.S.C. 1052(a)(2) 23
§ 202(a)(2)(B), 29 U.S.C. 1052(a)(2)(B) (1982) 2, 23
§ 203, 29 U.S.C. 1053 21
§ 204(b), 29 U.S.C. 1054(b) 19, 27
§ 204(b)(1)(H), 29 U.S.C. 1054(b)(1)(H)(i) 3
§ 204(b)(1)(H)(vi), 29 U.S.C. 1054(b)(1)(H)(vi) 25
§ 204(g), 29 U.S.C. 1054(g) 21
§ 403(c)(1), 29 U.S.C. 1103(c)(1) 5, 11, 12, 16, 17
§ 404, 29 U.S.C. 1104 ..... 8, 12, 16
§ 404(a)(1), 29 U.S.C. 1104(a)(1) 4, 11
§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) 5
§ 404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D) 13
§ 406, 29 U.S.C. 1106 ..... 6, 8, 11, 19
§ 406(a), 29 U.S.C. 1106(a) 8, 9, 15, 16
§ 406(a)(A)-(C), 29 U.S.C. 1106(a)(1)(A)-(C) 9, 14
§ 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D) ..... *passim*
§ 406(b), 29 U.S.C. 1106(b) 8
§ 408, 29 U.S.C. 1108 19
§ 408(b)(9), 29 U.S.C. 1108(b)(9) 17, 19
§ 409(a), 29 U.S.C. 1109(a) 8
§ 410(a), 29 U.S.C. 1110(a) 14
§ 502(a)(2), 29 U.S.C. 1132(a)(2) 8
§ 502(a)(3), 29 U.S.C. 1132(a)(3) 8
Tit. II, 26 U.S.C. 1 *et seq.* 2
§ 401(a) 16
§ 401(h) 17
§ 410(a)(2) (1982) 2
§ 410(a)(2) 23
§ 410(a)(2)(B) (1982) 23

Statutes and regulations—Continued: Page

§ 411 (b) (1) (H) (i) 3, 27
§ 411 (b) (1) (H) (v) 25
§ 411 (d) (6) 21
§ 415 (b) 17
§ 415 (c) 17

Tit. IV, 29 U.S.C. 1301-1461:

§ 4044, 29 U.S.C. 1344 19
§ 4044 (d), 29 U.S.C. 1344 (d) 16

Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 201, 104 Stat. 983 (1990) 22
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 ..... 2, 4

§§ 9201-9204, 100 Stat. 1975-1979 1
§ 9201, 100 Stat. 1973 ..... 2, 6, 27, 28, 29
§ 9202, 100 Stat. 1975 ..... 2, 6, 27, 28, 29
§ 9203 (a), 100 Stat. 1978 ..... 2, 4, 23, 24
§ 9204 (b), 100 Stat. 1980 23
§ 9404 (a) (1), 100 Stat. 1979 26

Reorganization Plan No. 4 of 1978, 92 Stat. 3790 25
Uruguay Round Agreements Act, Pub. L. No. 103-465, Tit. VII, 108 Stat. 4809:

§ 731, 108 Stat. 5003 17
§ 732, 108 Stat. 5004 17

26 U.S.C. 4975 (a)-(c) 9
26 U.S.C. 4975 (f) (5) 8, 20
26 U.S.C. 4980 (a) 17
26 U.S.C. 4980 (c) 17
26 C.F.R.:

Section 1.401 (a) (4)-4 (b) (2) (ii) (B) 22
Section 1.411 (a)-4 (c) 22
Section 1.411 (d)-4 21
Section 1.61-21 (a) (3) 21

29 C.F.R.:

Section 2509.75-2 (c) 18
Section 2509.75-5 10
Section 2509.75-8, D-3 13

Prop. Treas. Reg. § 1.411 (b)-2 (f) (1) (ii) 25, 26

Miscellaneous: Page

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T.A.M. LTR 9516005 (Dec. 22, 1994) 20
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-809

LOCKHEED CORPORATION, ET AL., PETITIONERS

v.

PAUL L. SPINK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART

INTEREST OF THE UNITED STATES

The Secretary of Labor is responsible for interpreting and enforcing the fiduciary obligation provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1001 *et seq.*) and 26 U.S.C. 4975. The Secretary of the Treasury is responsible for interpreting and enforcing Sections 9201-9204 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874. See also Reorganization Plan No. 4 of 1978, 92 Stat. 3790 (allocating administrative responsibilities under ERISA).

STATEMENT

1. Lockheed Corporation is the sponsor and a named fiduciary of a noncontributory defined-benefit pension

plan, known as the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the Plan). J.A. 45. The Plan is administered by a second named fiduciary, the Retirement Plan Committee, whose members are appointed by Lockheed's board of directors. J.A. 45-46. The Committee is responsible for determining benefit eligibility and certifying such eligibility to the Plan's trustee (the third named fiduciary) for purposes of benefit disbursement. J.A. 46-47.

2. In May 1979, respondent accepted an offer of employment from Lockheed. He was 61 years old. At that time, the Plan lawfully excluded from participation all employees who had reached age 60 when hired. Respondent alleges that, notwithstanding its general policy, Lockheed represented that if he accepted employment he would participate in the Plan and accrue credited service toward retirement benefits. In 1984, however, Lockheed notified respondent that he was not eligible to participate in the Plan because he was over 60 years old when hired. Pet. App. 2a-3a.

3. The Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874, amended Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*; Title II of ERISA (codified in various provisions of the Internal Revenue Code, 26 U.S.C. 1 *et seq.*); and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 631 *et seq.*, to prohibit pension benefit plans from discriminating against employees on the basis of age. Although prior law had generally barred plans from denying participation because of age, ERISA contained an express exception that permitted a plan to exclude any employee who was hired within five years of the plan's specified "normal retirement date" (typically age 65). See 29 U.S.C. 1052(a)(2) (1982); 26 U.S.C. 410(a)(2) (1982). Section 9203 of OBRA 1986 (100 Stat. 1979) eliminated that exception. Sections 9201 and 9202 of OBRA 1986 (100 Stat. 1973, 1975) amended the ADEA and ERISA to prohibit a different discriminatory practice, whereby a plan would cease accruing benefits for a participant (or reduce the rate of accrual) once the participant reached normal retirement age. Those amendments are codified at 29 U.S.C. 623(i)(1), 26 U.S.C. 411(b)(1)(H)(i), and 29 U.S.C. 1054(b)(1)(H)(i).

When OBRA 1986 took effect, Lockheed amended its Plan to eliminate the ban on participation by employees hired after they reached age 60. Pet. App. 3a-4a. As amended, however, the Plan provided that those employees who had previously been excluded from participation because of their age would "not receive Credited Service for [their] pre-Member service." *Id.* at 4a. Accordingly, although respondent became a participant, he received no credit for his prior years of service. *Ibid.*

4. In May 1990, Lockheed amended the Plan to establish two early retirement programs, which offered enhanced pension benefits (paid out of the Plan's assets) to certain salaried employees as an incentive for those employees to voluntarily terminate their employment. Pet. App. 4a. Any employee who wished to participate was required first to execute a release waiving "any claims the [employee] may have against [Lockheed] arising from termination of employment or otherwise." *Id.* at 17a. Respondent was eligible for early retirement, but he did not participate because he did not want to release any ADEA or ERISA claims that he might have had against Lockheed. *Id.* at 4a.

5. Respondent retired in June 1990. Pet. App. 4a. In February 1992, he filed suit against Lockheed, its executive officers, and other officers who served on Lockheed's Retirement Plan Committee (collectively, petitioners). *Ibid.* Respondent claimed (both individually and as a representative of all similarly situated employees): (i) that OBRA 1986 required the Plan to count, for purposes of pension accrual, an employee's years of service prior to OBRA 1986's effective date even if the employee had

been lawfully excluded from participation during such period; and (ii) that, to the extent that the 1990 Plan amendments required a broad waiver of claims against Lockheed as a condition to eligibility for enhanced early retirement benefits, the adoption and implementation of those amendments constituted a breach of fiduciary duty and a prohibited transaction, under Sections 404(a)(1) and 406(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1), 1106(a)(1)(D). Pet. App. 4a; J.A. 14-24.[1]

The district court granted petitioners' motion to dismiss the complaint. Pet. App. 23a-35a. The court rejected respondent's contention that Lockheed had breached a fiduciary duty or caused the Plan to engage in a prohibited transaction by amending the Plan to require a release of claims against Lockheed in return for enhanced early retirement benefits, on the ground that Lockheed acted as sponsor, not fiduciary, when it amended the Plan. *Id.* at 31a. The court also rejected respondent's claim that OBRA 1986 required the Plan to count, for purposes of pension accrual, years of service in which respondent had been lawfully excluded from participation. *Id.* at 25a-28a. The court observed that OBRA Section 9203's elimination of preexisting exceptions to the general ban on age-based exclusions from participation applies only with respect to plan years beginning on or after January 1, 1988, Pet. App. 27a (citing OBRA 1986, Pub. L. No. 99-509, § 9204(b), 100 Stat. 1980); and it reasoned that, if respondent was not entitled to retroactive Plan participation, neither was he entitled to retroactive benefit accrual. Pet. App. 28a.

[1] Respondent also claimed that, because he relied on Lockheed's representation that he would be permitted to participate in the Plan, Lockheed was estopped from denying him pension benefits based on his full years of service. Pet. App. 4a-5a. The district court rejected that claim. *Id.* at 33a-34a. The court of appeals did not address that issue because it concluded that OBRA 1986 required Lockheed to credit the same service. *Id.* at 13a n.4.

6. The court of appeals reversed. Pet. App. 1a-21a. It held that the 1990 Plan amendments that conditioned eligibility for enhanced early retirement benefits on the employee's execution of a waiver releasing Lockheed from all potential employment-related claims violated Section 406(a)(1)(D) of ERISA, 29 U.S.C. 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that it constitutes a "direct or indirect * * * transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." Pet. App. 13a-18a.[2]

The court acknowledged that Lockheed was "free to disregard employees' interests in amending the plan"; but it was not free, in the court's view, "to disregard the prohibitions of ERISA" in doing so. Pet. App. 16a. Here, the court reasoned, since Section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," Lockheed was similarly prohibited from requiring the releases as a condition precedent to receipt of Plan funds in the form of enhanced early retirement benefits. Pet. App. 16a. The court was not persuaded, moreover, that the releases at issue here—which, if valid, would "relieve[] Lockheed of countless * * * potential liabilities to thousands of employees"—constituted merely an "incidental benefit" to Lockheed. *Id.* at 17a-18a.

[2] The court did not address respondent's alternative claim that Lockheed's amendment of the Plan constituted a breach of fiduciary duty under 29 U.S.C. 1104(a)(1)(A)(i), nor respondent's contention that the fiduciaries' application of the amendment caused an unlawful inurement of Plan assets to Lockheed's benefit, in violation of 29 U.S.C. 1103(c)(1). Pet. App. 14a n.3. The court concluded that Lockheed could be held liable for the benefits it received as a party in interest to a prohibited transaction, *id.* at 14a-15a; see also *Reich* v. *Rowe*, 20 F.3d 25, 31 (1st Cir. 1994); *Reich* v. *Compton*, 57 F.3d 270, 285-287 (3d Cir. 1995); *Reich* v. *Stangl*, 73 F.3d 1027, 1031 (10th Cir. 1996). Petitioners do not take issue with that aspect of the court of appeals' decision.

The court of appeals also held that OBRA 1986 applies retroactively to require plans to credit employees for prior service at a time when they were lawfully barred from plan participation. Pet. App. 5a-13a. The court relied, however, not on Section 9203 of OBRA 1986 (which addresses age-based discrimination with respect to plan participation), but instead on Sections 9201 and 9202 (which address the cessation of accrual of benefits or reduction in the rate of accrual of benefits).

SUMMARY OF ARGUMENT

A. The decision whether to establish a pension plan and, if so, what level of benefits to provide, is made by an employer in its capacity as plan sponsor. Such decisions are not subject to ERISA's fiduciary standards. Once the plan has been established, however, the assets that the employer contributes to the plan belong to the plan, not to the employer, and plan management is subject to the strict fiduciary requirements in Title I of ERISA. Those fiduciary requirements reflect Congress's determination to prevent the appropriation or misuse of plan assets by employers and other related parties. To that end, Section 406 of ERISA categorically prohibits fiduciaries from causing plans to engage in certain types of transactions with employers or other parties in interest.

The prohibited transaction rules prohibit a *fiduciary* from causing a plan to engage in a transaction that, directly or indirectly, constitutes a transfer of plan assets to, or use of plan assets by or for the benefit of, a party in interest. Because Lockheed acted as settlor, rather than fiduciary, when it amended the Plan in 1990, the court of appeals erred in holding that the amendments violated ERISA's prohibited transaction rules. The judgment below therefore should be reversed and the case remanded for the court of appeals to consider in the first instance whether Lockheed and the other petitioners violated the

prohibited transaction rules (as well as other fiduciary provisions) in the *administration* of the 1990 Plan amendments.

The fiduciaries' payment of the Plan's assets in return for an employee's waiver of claims against Lockheed falls within the literal text of Section 406. If the prohibited transactions rules were enforced literally, however, plans could pay no pensions whatever, because all pension payments redound to the benefit of the employer insofar as they displace the employer's need to pay wages or other forms of compensation from its general assets and permit the employer to attract, retain, and motivate employees. But that does not mean that the rules permit the distribution of plan assets in return for any thing of value—such as the broad waivers of liability at issue in this case—so long as the distributions are made in the form of benefits.

B. Pension plans that lawfully excluded employees from participation on account of age before enactment of OBRA 1986, are not required, for purposes of calculating aggregate benefit accruals, to treat such employees as if they had been plan participants. Although OBRA 1986 amended ERISA to eliminate the statutory exception that permitted plans to exclude certain employees from participation, that change was expressly made prospective-only. The court of appeals erred in relying on a separate provision of OBRA 1986 that made it unlawful for a plan to cease accruing benefits for an employee (or reduce the rate of accrual) because of the employee's attainment of a particular age. A lesser amount of total benefits that results from an employee's having participated in a plan for fewer years is not the same thing as a reduction caused by a decrease in the rate of a participant's benefit accrual. There is no violation of the accrual rules if, as in this case, once the employee becomes a participant, his benefits accrue without cessation or decrease in rate.

ARGUMENT

I. LOCKHEED'S AMENDMENT OF THE PLAN DID NOT ITSELF CONSTITUTE A PROHIBITED TRANSACTION IN VIOLATION OF SECTION 406(a)(1)(D) OF ERISA

Section 406 of ERISA, 29 U.S.C. 1106, supplements Section 404's "core" fiduciary duties of loyalty and prudence, 29 U.S.C. 1104, by setting out categories of "prohibited transactions" in which a fiduciary may not cause a plan to engage, regardless of the fairness or reasonableness to the plan of any particular transaction. See *Commissioner* v. *Keystone, Consol. Indus., Inc.*, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."). Section 406(a) forbids a fiduciary from causing a plan to engage in specific types of transactions with (or benefitting) a "party in interest," 29 U.S.C. 1106(a), a term that is defined broadly to include, among others, the plan sponsor and its employees, 29 U.S.C. 1002(14)(C), (D) and (H). Section 406(b), in turn, addresses certain matters implicating fiduciary conflicts of interest. 29 U.S.C. 1106(b).[3] Title II of ERISA reinforces Section 406's fiduciary-directed rules by requiring any "disqualified person" (a term that includes most parties in interest) who participates in a prohibited transaction to pay an excise tax on the transaction and to correct it. See 26 U.S.C. 4975; *Commissioner* v. *Keystone Consol. Indus., Inc., supra.*

[3] ERISA provides various remedies for violations of Title I's prohibited transaction rules. Plan fiduciaries may be required to make good to the plan any losses resulting from prohibited transactions they have caused. 29 U.S.C. 1132(a)(2) and 1109(a). The courts are also authorized to provide injunctive relief and "other appropriate equitable relief" to redress violations of the Act. 29 U.S.C. 1132(a)(3). The appropriate remedy for a prohibited transaction is correction, *M & R Investment Co.* v. *Fitzsimmons*, 484 F. Supp. 1041, 1057 (D. Nev. 1980), aff'd, 685 F.2d 283 (9th Cir. 1982), see 26 U.S.C. 4975(h), which entails "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards," 26 U.S.C. 4975(f)(5), (h)—*e.g.*, through an order requiring the party in interest to disgorge to the plan any unjust enrichment.

In addition to the transactions enumerated in Sections 406(a)(1)(A)-(C) (sales, exchanges, and leases of property; extensions of credit; and the furnishing of goods or services between the plan and a party in interest), Section 406(a)(1)(D) prohibits a fiduciary from causing the plan to engage in any transaction the fiduciary knows or should know "constitutes a direct or indirect * * * transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." 29 U.S.C. 1106(a)(1)(D).

1. The prohibited transaction rules in Title I of ERISA do not speak to the lawfulness of transactions, but rather to the lawfulness of fiduciary conduct.[4] Section 406(a) is violated only when a *fiduciary* causes the plan to engage in one of the enumerated transactions. The court below erred in holding that the amendment of the Plan constituted a prohibited transaction, because Lockheed was not acting in a fiduciary capacity when it amended the Plan.

A plan sponsor does not act as a fiduciary when it creates, amends, or terminates a pension plan. See Pet. 9-11 (citing decisions by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits); cf. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.") (citation omitted). As defined by Section 3(21)(A) of ERISA, 29 U.S.C. 1002(21)(A), .

[4] The corresponding provisions in Title II of ERISA are concerned solely with the transaction itself, and do not require any showing of fiduciary conduct. 26 U.S.C. 4975(a)-(c).

a person is a fiduciary only "to the extent" that the person (i) exercises certain management authority or control over the plan or its assets; (ii) renders investment advice for a fee or has authority to do so; or (iii) has discretionary authority or responsibility in administering the plan. See 29 C.F.R. 2509.75-5. When an employer amends a plan of which it is the sole sponsor, it acts as a settlor, establishing the terms that will govern the plan; the employer is not in that context managing plan assets, administering the plan, or engaging in any other defined fiduciary function. *Joseph Schlitz Brewing Co.* v. *Milwaukee Brewery Workers*, 3 F.3d 994, 1001 (7th Cir. 1993) ("Managing a plan is some distance from establishing the *terms* of a plan."), aff'd, 115 S. Ct. 981 (1995); *Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), cert. denied, 490 U.S. 1020 (1989).[5]

The separation of fiduciary from settlor functions inheres in the structure of the Act. Congress did not require employers to establish employee benefit plans; it left the decision to establish (or terminate) a plan, and decisions respecting the level of benefits to be provided, largely to private parties. See *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). When an employer establishes a plan, it does so to further its own business interests. If the employer is a corporation, it must generally ensure, as a matter of state corporation law, that the benefits provided bear a reasonable relationship to employee service to the corporation. See, *e.g.*, *Lieberman* v. *Becker*, 155 A.2d 596, 598 (Del. 1959). If the plan is established through collective bargaining, the settlor representing the employer and the settlor representing the labor union each "owes complete loyalty to * * * the interests of [the parties] [they] represent[]." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Any attempt to impose on these parties a duty to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. 1104(a)(1); see also 29 U.S.C. 1103(c)(1), would be both unworkable and radically at odds with the balance struck by Congress. "[P]ure business decisions are not governed by fiduciary standards." *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992); see also *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336 (1981) (atmosphere in which an ERISA fiduciary must operate is "wholly inconsistent with [the collective bargaining] process of compromise and economic pressure").

[5] Sponsors of multiemployer plans are, in some respects, held to fiduciary standards. See *Siskind* v. *Sperry Retirement Program, Unisys*, 47 F.3d 498, 505-507 (2d Cir. 1995); *Nazay* v. *Miller*, 949 F.2d 1323, 1332-1333 (3d Cir. 1991).

2. For the foregoing reasons, we agree with petitioners that the court of appeals erred in holding (Pet. App. 13a-14a) that Lockheed violated Section 406(a)(1)(D) of ERISA when it adopted the 1990 Plan amendments. Respondent also alleged in his complaint, however, that the *implementation* of the amendments (granting individual participants enhanced early retirement benefits only upon the participants' execution of a waiver) by the Plan's fiduciaries caused prohibited transactions. See J.A. 22-24; Br. in Opp. i, 3-4. The court of appeals did not specifically address that issue, and this Court accordingly might choose to refrain from doing so. The question whether implementation of the Plan violated Section 406 was not among the questions presented in the certiorari petition. Pet. i, 7-16. Moreover, although petitioners argued in the certiorari petition that there was a circuit conflict warranting resolution by this Court on the question whether an employer acts as a fiduciary (and therefore is subject to the prohibited-transactions provisions in Section 406) when it amends a plan (see Pet. 8-12, Reply Br. Pet. Stage 2-6), they pointed to no such circuit conflict concerning

the application of Section 406(a)(1)(D) to plan administration in this setting. The Court may benefit from allowing for further percolation of the issue in the lower courts.

That course makes particular sense in this case. Respondent has argued that the conditioning of enhanced early retirement benefits on an employee's waiver of claims violates not only Section 406(a)(1)(D) of the Act, but also the general fiduciary duties imposed by Section 404 and the anti-inurement restriction in Section 403(c)(1). See Pet. App. 14a n.5. All of those issues remain open in the court of appeals on remand. In our view, it would be appropriate to allow the court of appeals to consider Sections 403, 404 and 406 together in determining what restrictions are imposed on fiduciaries (and parties in interest) in the *administration* of plan provisions such as those added by Lockheed in 1990, rather than for this Court to consider the application of Section 406(a)(1)(D) in isolation, and to do so without the benefit of the views of the lower courts.

3. We nevertheless shall address some considerations relevant to the application of Section 406(a)(1)(D) in circumstances such as these, in the event that the Court chooses to do the same. In this case, the relevant question would be whether, by authorizing the Plan's trustee to pay enhanced early retirement benefits to eligible employees who, in exchange, executed broad releases of claims against Lockheed (an "employer," and therefore a "party in interest," 29 U.S.C. 1002(14)(C)), the persons who administered the Plan (by definition, fiduciaries, 29 U.S.C. 1002(21)(A)(iii)) "caused" the Plan "to engage in a transaction" that "constitute[d] a direct or indirect * * * transfer [of Plan assets] to, or use [of Plan assets] by or for the benefit of" Lockheed, within the meaning of Section 406(a)(1)(D).

a. Petitioners asserted at the petition stage (Pet. 12 n.5; Reply Br. 5 n.4) that, unless Lockheed acted as a

fiduciary when it amended the Plan, Lockheed and the individual petitioners could not have caused the Plan to engage in a prohibited transaction, or otherwise breached their fiduciary duties, when they administered the amended Plan in accordance with its terms. In essence, they contended that a fiduciary does not "cause" a prohibited transaction by, and can never be faulted for, administering a plan in accordance with its terms. That position is without merit. A plan administrator is a fiduciary with independent statutory responsibilities, 29 C.F.R. 2509.75-8, D-3, and when a fiduciary authorizes a sale or lease of plan property, a loan of plan funds, or (as here) a distribution of plan assets, the fiduciary plainly "causes" the plan to act, in both a proximate and a but-for sense.[6]

A fiduciary is obliged to "discharge his duties with respect to a plan * * * in acordance with the documents and instruments governing the plan," but—critically—only "insofar as such documents and instruments are consistent with" Title I of ERISA. 29 U.S.C. 1104(a)(1)(D). That proviso makes clear that a fiduciary is not to give effect to a plan provision when to do so would violate the Act. See *Central States*, 472 U.S. at 568 ("trust documents cannot excuse trustees from their duties under ERISA"); Chamber of Commerce Amicus Br. Pet. Stage 9-10 ("[T]he plan administrator has a duty not to give

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[6] The concept that a plan administrator is a mere functionary charged with mechanical application of the sponsor's written instructions is foreign to ERISA. Cf. *Schoonejongen*, 115 S. Ct. at 1230 (noting that plan administrator's duty to operate plan in accordance with governing documents may include responsibility to "sort[] out, from among the occasional corporate communications that pass through their offices and that conflict with existing plan terms, the bona fide amendments from those that are not"); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 571-572 (1985) (trustees have duty to act affirmatively to ensure that employer pays funds owed to plan).

effect to plan amendments that constitute prohibited transactions.").[7]

Petitioners' contrary view would eliminate plan fiduciaries' independent responsibility for ensuring that their management of plan assets and administration of the plan complies with ERISA's fiduciary standards, thereby nullifying an internal check and balance that is critical to enforcement of the Act. See 29 U.S.C. 1110(a) (any plan provision that purports to relieve a fiduciary of his duty to comply with the requirements of the Act is "void as against public policy"). Because the fiduciary necessarily retains an obligation to determine the lawfulness of his conduct, the fiduciary may not—by disavowing that he is "the cause"—effect a sale of plan property to the employer (in violation of Section 406(a)(1)(A)), make a loan of plan funds to the employer (in violation of Section 406(a)(1)(B)), execute a contract for goods or services between the plan and the employer (in violation of Section 406(a)(1)(C)), or transfer plan assets to the employer (in violation of Section 406(a)(1)(D)), regardless of any directives contained within the governing plan documents.[8]

b. The other operative terms in Section 406(a)(1)(D) —"transaction," "use," and "benefit"—are not defined by ERISA. In ordinary usage, however, the provision of enhanced retirement benefits in exchange for an employ-

[7] Similarly, at common law, "[t]he trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal." Restatement (Second) of Trusts § 661(1), at 347 (1959); accord 2A W.F. Fratcher, *The Law of Trusts* § 166, at 265 (4th ed. 1987).

[8] Similarly, a fiduciary may not follow provisions in plan documents that direct an imprudent investment policy. See DOL Advisory Op. (unnumbered), 1988 ERISA LEXIS 19 (Feb. 23, 1988) ("ERISA contains no provision which would relieve an investment manager of fiduciary liability for any decision he made at the direction of another person.").

ee's early retirement and release of claims against the employer is a "transaction." See *Webster's Third New International Dictionary* 2425 (1986) ("act, process, or instance of transacting"); *ibid.* (to "transact" is to "carry on business"); *Black's Law Dictionary* 1496 (6th ed. 1990) ("[a]n act, agreement, or several acts or agreements between or among parties whereby a cause of action or alteration of legal rights occur"). The payment of increased pension benefits is one "use" of plan assets. See *Webster's Third New International Dictionary, supra,* at 2523-2524 (to "employ" or "utilize"). And that use of plan assets here redounded to Lockheed's "benefit," *Black's Law Dictionary, supra,* at 158 ("advantage or profit"), particularly insofar as the enhanced benefits were exchanged for the releases.[9]

Section 406(a)(1)(D) cannot, however, be read to prohibit all transactions that might be thought to fall within its literal terms, for under such a reading all benefit payments would be forbidden: Since pension benefits compensate employees for their service to the employer, the provision of pension benefits is an indirect use of plan assets for the benefit of the employer.[10] Congress clearly did not intend to prevent employers from compensating employees for their labor in the form of pension benefits

[9] Petitioners do not claim that they were unaware that the execution of the releases benefited Lockheed. This case does not present a question, therefore, whether the Plan's fiduciaries "kn[ew] or should [have] know[n]" that the exchanges of enhanced early retirement benefits for waivers were uses of plan assets for the benefit of Lockheed. See 29 U.S.C. 1106(a).

[10] Although an "employee" is also a "party in interest" (29 U.S.C. 1002(14)(C) and (H)), the payment of pension benefits does not constitute a direct transfer of plan assets to a party in interest. By the time pension payments are made, the participant is no longer employed by the employer, and he is therefore no longer an "employee" within the meaning of the Act. 29 U.S.C. 1002(6).

or to interfere with an employer's freedom to design (and modify from time to time) the optimal mix of wages and benefits in its compensation package. The primary purpose of ERISA, after all, was to encourage and safeguard the payment of pension benefits. See 29 U.S.C. 1001; see also 29 U.S.C. 1104 (fiduciaries are required to discharge their duties to the plan "for the exclusive purpose of * * * providing benefits to participants and their beneficiaries").

A court must therefore "go beyond" what is, for present purposes, the "unhelpful text," *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995), in order to harmonize the broad language of Section 406(a)(1)(D) with the overall structure and evident purposes of ERISA. But the text cannot be ignored altogether. The prohibitions in Section 406(a) reflect, in part, Congress's intent that employers not be permitted to obtain plan assets before employees receive the benefits to which they are entitled, a concern that is manifested in several provisions of the Act. See, *e.g.*, 29 U.S.C. 1103(c)(1) (unless excepted, "the assets of a plan shall never inure to the benefit of any employer"); 26 U.S.C. 401(a)(2) (no part of a tax-qualified fund may be "used for, or diverted to, purposes other than for the exclusive benefit of [the employer's] employees").[11] Although that concern obviously would

[11] Contrary to the suggestion of amici ERISA Industry Committee, et al. (ERIC) at the petition stage (Br. 18-19), the fact that an employer has a reversionary interest in a plan's assets upon the plan's termination, 29 U.S.C. 1344(d), does not mean that the employer should be permitted free access to those assets outside of the context of plan termination. ERISA's provision for reversion of residual assets upon termination is an express exception to the general rule that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1) and (d). Reversion is permitted upon termination only subject to the employee-protective provisions of 29 U.S.C. 1344, which make clear, among other things, that the employer may receive a distribution only after "all liabilities of the plan to participants and

not justify forbidding the use of plan assets to fund ordinary pension benefits when a participant retires, it counsels against permitting uses that depart substantially from that paradigm.

The benefit that Lockheed received in this case in exchange for the payment of enhanced early retirement benefits differed in kind from the sorts of benefits that an employer ordinarily receives in exchange for pensions. Pension distributions normally relate to an employee's level of compensation or years of service, or both. See 26 U.S.C. 415(b), (c). That is to be expected, because employee benefits developed as "a means of compensating workers in lieu of increased wages, thus making pension benefits a form of deferred wages." S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973); see also H.R. Rep. No. 533, 93d Cong., 1st Sess. 2-3 (1973). Although the enhanced benefits provided under Lockheed's early retirement programs may be viewed, in part, as consideration for both

their beneficiaries have been satisfied," 29 U.S.C. 1103(c)(1) and (d); 29 U.S.C. 1108(b)(9), and even then the reversion is subject to an excise tax in an amount equal to 20%-50% of the reversion, 26 U.S.C. 4980(a) and (c).

Sections 401(h) and 420 of the Internal Revenue Code also permit a limited use by the employer of plan assets, by transferring them to a separate account in the plan for the purpose of paying retiree medical benefits under certain carefully defined circumstances. 26 U.S.C. 401(h) and 420, amended by Pub. L. No. 103-465, Tit. VII, §§ 731, 732, 108 Stat. 5003-5004 (1994). Congress enacted specific exemptions from the anti-inurement and prohibited transaction provisions of ERISA for such transfers. See 29 U.S.C. 1103(c)(1) and 1108(b)(13) (Supp. V 1993). The implication of those exceptions, of course, is that an employer's use of plan assets for that purpose might otherwise constitute a prohibited transaction by relieving the employer of responsibility for paying such retiree health benefits. See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1147 (1990) ("Although the decision to transfer assets is a settlor decision made by the employer, the implementation of that decision by the fiduciary is subject to the fiduciary duties and legal and equitable remedies under ERISA.").

past services and foregone future wages and benefits (to the extent that the pension benefits compensate the employees for their early retirement), the enhanced benefits were also, in part, consideration for the employees' releases of legal claims against Lockheed. Those releases purported to relieve Lockheed of potential liabilities (perhaps substantial in amount) for past conduct, including torts that Lockheed may have committed (*e.g.*, defamation or sexual harassment) against the signatories. The execution of releases of accrued claims against the employer is not a routine incident of the employment relationship, and paying employees to give up their accrued claims cannot be equated with compensation for services rendered.

Petitioners concede (Pet. 13) that plan fiduciaries would have violated Section 406(a)(1)(D) if they had simply taken funds from the Plan and used those funds to write checks to the employees to settle adverse claims against Lockheed. That would have been both a direct "transfer" to Lockheed of Plan assets and a direct "use" of Plan assets "by" and "for the benefit of" Lockheed. The fact that the employees in this case were instead compensated for their individual releases in the form of enhanced pension benefits does not in itself remove those transactions from the reach of Section 406(a)(1)(D). That Section reaches "indirect" as well as "direct" uses. The arrangement here conferred a real, if "indirect," benefit on Lockheed: the employee entered into an agreement with the plan under which plan assets are given to the employee (in the form of benefits) in exchange for the employee's transfer of a potentially valuable asset (the release of claims) to the employer. Cf. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 309 (1974) ("[I]t is expected that where a mutual fund, *e.g.*, acquires property from a party-in-interest as part of the arrangement under which the plan invests or retains its investment in the mutual fund, this is to be a prohibited transaction."); 29 C.F.R. 2509.75-

2(c) ("[T]he purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.").[12]

If every transfer of plan assets in the form of benefits were insulated from scrutiny under Section 406(a), then an employer that desired to acquire the land underlying the homes of employees who lived adjacent to its factory could purchase that land with the plan's assets, simply by amending the plan to make signing over the deed to a designated home a criterion of eligibility for significantly enhanced benefits. More typically, an employer might design a plan under which eligibility for all benefits, other than minimal benefits provided upon "normal" retirement, see 29 U.S.C. 1054(b), would be conditioned on the participant's execution of periodic releases. In the absence of language so directing, it would be odd to interpret Section 406(a)(1)(D) to permit employers to purchase employees' assets or to pay off any and all employee claims with tax-deferred pension funds.

[12] Although Section 408 of ERISA (29 U.S.C. 1108) exempts several categories of transactions that fall within the scope of Section 406, there is no exception that in terms covers the indirect benefit gained by an employer as an aspect of transactions that also involve the payment of pension benefits to participants. Section 408(b)(9) relates to "the making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan *if such assets are distributed in the same manner as provided under [Section 4044 of ERISA, 29 U.S.C.] 1344*" (emphasis added). Section 4044 of the Act concerns only the allocation of assets upon plan termination. That exception was necessary to permit the direct transfer of plan assets to existing employees and the reversion of surplus plan assets to the employer when a plan is terminated; it does not appear that it was designed to address the payment of benefits under an ongoing plan; and it seems most unlikely that Congress intended Section 408(b)(9) to create a categorical exception to Section 406 for all prohibited transactions made in the form of benefit payments, so long as those transactions are "in accordance with the terms of the plan."

c. An interpretation of Section 406(a)(1)(D) that prohibits all nonexempt uses of plan assets for the benefit of employers, other than the distribution of plan assets as ordinary pension benefits (*i.e.*, in return for services rendered), makes sense of the prohibition in the overall framework of ERISA without casting doubt on accepted and routine uses of pension plans. So long as it is clear that plan assets may be employed freely to pay pension benefits awarded as compensation for services, there can be no dispute over employers' ability to "create or amend their pension plans * * * to add new benefits or increase present benefits for express corporate purposes such as attracting and retaining employees, deferring employee compensation from immediate taxation, settling collective bargaining disputes, avoiding strikes, and providing compensation increases without using immediate cash or in lieu of wage increases." Pet. 14.[13]

An employer may provide increased pension benefits as an incentive for early retirement, because such an arrangement merely modifies the composition of the overall compensation package: Enhanced pensions are granted as compensation for the employees' past services, as well as for the wages and other benefits they would have re-

[13] Cf. T.A.M. LTR 9516005 (Dec. 22, 1994) (parallel prohibited-transaction provision of Internal Revenue Code, 26 U.S.C. 4975 (c)(1)(D), allows employer to amend pension plan to provide for payment of supplemental retirement benefits previously paid out of employer's general assets under obligation undertaken by employer as incentive for early retirements). Conditioning the payment of benefits on the takeover of a company, as in *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994), is also permissible because it is the possibility (threat), embodied in the plan itself, that benefit payments may be made, not the actual payment of plan assets, that benefits the employer. Moreover, in that situation, the fiduciary's payment of enhanced benefits upon the occurrence of the takeover contingency does not result in an employee-specific transaction that includes a particularized transfer of value to the employer, as in this case.

ceived if they had not retired, and the increased benefits have the incidental effect of increasing morale among the employees who remain on the job during a company downsizing.[14] By the same token, a waiver of ADEA or other claims arising out of the early retirement itself may be regarded as reasonably incidental to the employee's retirement, and therefore to the payment of benefits.

There is no occasion here to resolve the application of Section 406(a)(1)(D) in these and myriad other situations. Nor, more narrowly, is there any occasion at this stage of the case to determine what claims might properly be included in a release that is made a condition of an employee's early retirement. The releases at issue in this case—which waived "virtually all employment-related claims * * * against Lockheed" (Pet. App. 4a)—went well beyond forestalling any dispute over the employees' contract of employment or their retirement. The releases purported to relieve Lockheed of potential liabilities for a broad range of past occurences, such as toxic torts, work-related injuries, and race or sex discrimination. At least to that extent, the distribution of Plan assets in exchange for the releases would appear to constitute a prohibited "use by or for the benefit of a party in interest" of

[14] Increasing benefits under a pension plan in exchange for a retiree's agreement not to compete with the employer is similarly a way of compensating the retiree for continuing a form of behavior (not working for competitors) that an employer generally expects of its employees as a condition of their employment. See 26 C.F.R. 1.61-21(a)(3). We note, however, that a plan provision for forfeiture of pension benefits if the beneficiary does not comply with a covenant not to compete may violate ERISA's accrual or vesting requirements. See 29 U.S.C. 1053; 29 U.S.C. 1054(g); 26 U.S.C. 411(d)(6); 26 C.F.R. 1.411(d)-4, A-4 (violation when plan allows employer discretion to deny participant protected benefit for which participant is otherwise eligible); 26 C.F.R. 1.411(d)-4 A-6 (permissible to condition availability of single sum distribution on execution of covenant not to compete); see *Noell* v. *American Design Inc.*, 764 F.2d 827, 831 (11th Cir. 1985).

Plan assets, in violation of Section 406(a)(1)(D) of ERISA.[15]

II. OBRA 1986 DOES NOT REQUIRE AN EMPLOYER TO CONSIDER FOR PURPOSES OF BENEFIT ACCRUAL YEARS OF SERVICE IN WHICH AN EMPLOYEE WAS LAWFULLY EXCLUDED FROM PARTICIPATING IN A PENSION PLAN BECAUSE OF HIS AGE

ERISA has, from its inception, prohibited pension plans from excluding employees from participation be-

[15] That conclusion is not inconsistent either with Treasury Department regulations (Pet. 15-16) or the ADEA (Pet. 28). As petitioners observe (Pet. 15-16), the Treasury Department has issued regulations that permit the use of covenants not to compete and waivers of age discrimination claims. Those regulations, however, speak only to compliance with the non-discrimination and vesting requirements for tax-qualified pension plans. See, *e.g.*, 26 C.F.R. 1.411(a)-4(c), Example 1; 26 C.F.R. 1.401(a)(4)-4(b)(2)(ii)(B). The Treasury Department has expressly cautioned that compliance with those regulations does not ensure compliance with the provisions of Title I of ERISA, which the Secretary of Labor administers. 58 Fed. Reg. 46,773, 46,778 (1993).

The Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 201, 104 Stat. 983, amended the ADEA to regulate the conditions under which employees may waive age discrimination claims. See 29 U.S.C. 626(f)(1). Although Congress understood that such waivers were used in some early retirement programs, 29 U.S.C. 626(f)(1)(H), not all early retirement programs involve the use of pension benefits, and OWBPA does not specifically address whether employers may condition receipt of pension benefits on a waiver of age discrimination claims, much less a waiver of all employment-related claims. Finally, although the issue has not been raised in this case, there is some question whether an employer is required to offer a greater early retirement enhancement to those employees who waive ADEA claims than to employees who have no potential ADEA claims. The Equal Employment Opportunity Commission has established a negotiated rulemaking advisory committee to study this and other questions related to the waiver of rights and claims under the ADEA. See 60 Fed. Reg. 45,388 (1995).

cause of their attainment of a specified age. Before the enactment of OBRA 1986, however, that prohibition did not apply with respect to "employees [who] beg[an] employment with the employer after they ha[d] attained a specified age which [wa]s not more than 5 years before the normal retirement age under the plan." 29 U.S.C. 1052(a)(2)(B) (1982); 26 U.S.C. 410(a)(2)(B) (1982). In accord with then-existing law, Lockheed's Plan excluded from participation any employee hired within five years of "normal retirement age," which was 65. Because respondent was hired by Lockheed when he was 61 years old, he was lawfully excluded from participating in the Plan.

Section 9203(a) of OBRA 1986 amended both 29 U.S.C. 1052(a)(2) and 26 U.S.C. 410(a)(2) to eliminate that exception to the general anti-discrimination rule. 29 U.S.C. 1052(a)(2) now provides: "No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." 26 U.S.C. 410(a)(2) now provides: "A trust shall not constitute a qualified trust under section 401(a) if the plan of which it is a part excludes from participation (on the basis of age) employees who have attained a specified age." Those amendments apply, however, "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA 1986 § 9204(b), 100 Stat. 1980.

In response to OBRA 1986, Lockheed amended the Plan to include all eligible employees (including respondent) as participants irrespective of their age when hired, starting with the plan year beginning on December 25, 1988. Respondent began accruing Plan benefits as of that date. He received no credit, however, for his prior period of employment (1979 to December 25, 1988), during which he had been lawfully excluded from participation.

1. In holding that respondent should have been credited with the level of benefits that he would have accrued

had he been a participant all along, the Ninth Circuit applied OBRA 1986 retroactively; *i.e.*, as if the modifications that it made to ERISA had always been the law. That treatment is inconsistent with the plain text of OBRA 1986 and with the interpretation of that text by the Department of the Treasury. Section 9203(a) of OBRA 1986 eliminated provisions in ERISA that had expressly permitted plans to exclude certain employees from participation in pension plans because of their age, but the text of Section 9203(a) does not direct plans, for purposes of determining total accrued benefits, to treat those employees who were lawfully excluded from participation as if they had always been plan participants. In the absence of any statutory language suggesting that plans have a duty to rectify past lawful discrimination, there is no basis for applying Section 9203(a) retroactively. See *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994). Section 9204(b) of OBRA 1986 confirms the prospective-only nature of Section 9203(a). It provides in no uncertain terms that the amendments made to ERISA's participation rules apply "only with respect to service performed" in plan years beginning on or after January 1, 1988.

The Secretary of the Treasury has consistently interpreted Section 9203(a) to have only prospective effect. The preamble to the Department's proposed regulations regarding the application of OBRA 1986 explained as follows:

> In the case of an employee who was ineligible to participate in a plan before the effective date of amended Code section 410(a)(2) because of a maximum age condition and who is eligible to participate in the plan on or after the effective date of such section, * * * *hours of service and years of service credited to the employee before the first plan year beginning on or after January 1, 1988, are not required to be taken into account for purposes of determining the employee's accrued benefit under the plan for plan years beginning on or after January 1, 1988.*

53 Fed. Reg. 11,877 (1988) (emphasis added). The proposed regulation (Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii)) states unequivocally that "a defined benefit plan is not required under section 411(b)(1)(H) [of the Internal Revenue Code] to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan." *Ibid.*

The court of appeals correctly observed (Pet. App. 13a n.3) that the Treasury Department's proposed regulations have not been finalized.[16] The preamble to the proposed regulations, however, advised that "taxpayers may rely on the[] proposed regulations for guidance pending the issuance of final regulations." 53 Fed. Reg. at 11,878. In light of the reliance that taxpayers have placed on the proposed regulations, and because the Secretary of the Treasury is charged with interpreting the OBRA 1986 provisions at issue, see 26 U.S.C. 411(b)(1)(H)(v); 29 U.S.C. 1054(b)(1)(H)(vi); Reorganization Plan No. 4 of 1978, 92 Stat. 3790, the Secretary's consistent interpretation is entitled to substantial deference.

2. The court of appeals appears to have appreciated that Section 9203(a) of OBRA 1986 applies only prospectively. See Pet. App. 12a. Hence, the court did not rely on the OBRA 1986 amendments to ERISA's participation rules to support its conclusion that respondent must be credited with the years of service he performed before he became a plan participant. The court looked instead to Sections 9201 and 9202 of OBRA 1986, which address a different discriminatory practice—the termination of further accrual of pension benefits by

[16] On December 9, 1988, the Internal Revenue Service announced that it intended to promulgate final regulations consistent with the proposed regulations, I.R.S. Notice 88-126, 1988-2 C.B. 538, but no final regulations have been issued to date.

a person who *was* a participant, upon the participant's attainment of normal retirement age. See generally 43 Fed. Reg. 43,264 (1978); *AARP* v. *EEOC*, 655 F. Supp. 228 (D.D.C.), rev'd, 823 F.2d 600 (D.C. Cir. 1987).

Section 9201 of OBRA 1986 amended the ADEA to forbid any sponsor from establishing or maintaining a pension plan that requires or permits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age." See 29 U.S.C. 623(i)(1). Section 9202 made corresponding changes to Titles I and II of ERISA. See 26 U.S.C. 411(b)(1)(H)(i) ("[A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age."); 29 U.S.C. 1054(b)(1)(H)(i) (same). The amendments made by Sections 9201 and 9202 apply "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." OBRA 1986 § 9204(a)(1), 100 Stat. 1979.

The Secretary of the Treasury's proposed regulations provide that, unlike the amendments concerning age-discrimination in plan eligibility requirements (which were entirely prospective), OBRA 1986's prohibition on discrimination with regard to benefit accrual applies retroactively in certain contexts, to wit, with respect to persons who were participants prior to the effective date of OBRA 1986, who had 1 hour of service in a plan year beginning on or after January 1, 1988, and whose benefit accruals had been terminated or reduced in a prior year on account of attaining a certain age. Prop. Treas. Reg. § 1.411(b)-2(f)(1)(ii), 53 Fed. Reg. 11,876, 11,884 (1988). In Notice 88-126, 1988-2 C.B. 538 (1988), the Internal Revenue Service announced its

intention to adhere to that proposal when it issues final regulations.[17]

OBRA 1986's prohibition on the termination (or reduction in the rate) of accrual of a participant's benefits on account of age has no application in this case.[18] Before respondent became a Plan participant, he had no entitlement to the accrual of pension benefits. See 29 U.S.C. 1054(b) (specifying accrual requirements for *participants* in defined benefit plans); 26 U.S.C. 411 (b)(1) (same). Respondent became a participant in the Plan on December 25, 1988, the first day of the first Plan year beginning on or after January 1, 1988, and his pension accrued thereafter without cessation or a reduction in rate until his retirement.

In holding that the Plan's treatment of respondent nonetheless violated OBRA 1986, the court of appeals stated (Pet. App. 7a):

> The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit

[17] Contrary to respondent's argument (Br. in Opp. 27-28), nothing in the December 9, 1988, IRS Notice implied that the Secretary of the Treasury has changed his view (as stated in the proposed regulations) that pension plans are not required to take into account for benefit accrual purposes any year of service completed before an employee became a participant. Indeed, the Notice stated that the final regulations would "adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits." 1988-2 C.B. 538. The further comment that the final regulations would "*generally* provide that no year of service (including years of service before 1988) may be disregarded because of age in determining a participant's benefit," *ibid.* (emphasis added), does not suggest that plans are required to include years of service completed before the employee even became a participant.

[18] Accordingly, the correctness of the Secretary of the Treasury's proposed regulations insofar as they provide for limited retroactive application of Sections 9201 and 9202 of OBRA 1986 is not at issue here.

accrual calculation. OBRA prohibits age-based reduction in "the rate of benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the plan results in a reduced rate of benefits for that employee.

The court's explanation demonstrates that its ruling was based on a fundamental misunderstanding. The court equated a decrease in total benefits with a decrease in the "rate" of benefit accrual. Although the rate of accrual affects the total benefits accrued, it is one of several factors, which include, in addition, the participant's date of participation, years of service, and salary level. For example, a participant may be entitled to a rate of benefit accrual of two percent of salary for each year of service:

$$\text{Total Accrued Benefit} = .02 \times \text{Salary} \times \text{Years}$$

A reduction in any of the factors will decrease the product. Sections 9201 and 9202 of OBRA 1986, however, address only a cessation of accrual (*i.e.*, making the "rate" zero) or a reduction in the rate of accrual. The effect of OBRA 1986, in the context of the example, would be to prohibit the plan from providing that a participant would accrue only one percent of salary for each year of service performed after he reached normal retirement age.[19]

In this case, the Plan did not cease accruing pension benefits for respondent or reduce the rate of his pension's accrual. After respondent became a participant, on December 25, 1988, he accrued benefits at the same rate as all other participants in the plan. His total accrued benefit is unquestionably less than it would have been had

[19] Sections 9201 and 9202 of OBRA 1986 would also bar indirect or sham attempts to reduce the rate of accrual—*e.g.*, by providing that, once a participant reaches normal retirement age, the participant's salary or years of service in ensuing years will be counted at only 50% of their actual values for purposes of benefit accrual.

he been permitted to participate in the Plan from 1979, when he was first hired by Lockheed. But his exclusion from participation was lawful at the time, and, while Congress has since eliminated the provisions that permitted respondent's exclusion, that change was prospective-only. Sections 9201 and 9202 may not be invoked, as they were in this case, to circumvent Congress's considered judgment not to require plans to accrue benefits retroactively for years of service in which an employee was lawfully excluded from participation.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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QUESTIONS PRESENTED

Respondents Paul L. Spink, et al., restate the Questions Presented in the Petitioners' brief as follows:

1. Whether the Ninth Circuit correctly held that a pension plan sponsor can be liable for breach of fiduciary duty under Section 406 the Employee Retirement Income Security Act of 1974 ("ERISA"), when it amends the terms of its pension plan, as Lockheed did here.

2. Whether the Ninth Circuit correctly applied the legal standard this Court enunciated in Landgraf v. USI Film Prods., 114 S.Ct. 1483 (1994) in holding that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA") to eradicate age discrimination, requires Lockheed to calculate pension benefits for older workers by including all years of service regardless of age, including those years when an employee was excluded from plan participation because of age.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION SET FORTH IN LOCKHEED'S PETITION 5

II. LOCKHEED ENGAGED IN A PROHIBITED TRANSACTION IN AMENDING ITS PLAN TO DIRECT PLAN FIDUCIARIES TO USE PLAN ASSETS BY AND FOR ITS BENEFIT 7

A. Lockheed's Amendment Caused The Plan To Use Plan Assets For the "Benefit" of A Party in Interest 10

B. Lockheed Acted As a Fiduciary in Amending the Plan to Dispose of Plan Assets 15

1. By Amending the Plan, Lockheed Exercised Actual Control Over the Disposition of Plan Assets 17

2. As a Named Fiduciary Under the Plan, Lockheed Had Discretionary Authority and Responsibility Regarding Plan Administration 23

III. IN ENACTING OBRA, CONGRESS PROHIBITED USE OF AN ACCRUAL FORMULA WHICH EXCLUDES PRE-ENACTMENT YEARS OF SERVICE WHEN AN EMPLOYEE WAS BARRED FROM PARTICIPATION BECAUSE OF AGE 24

A. The Plain Language of OBRA 1986's Benefit Calculation Provisions Bars Any Kind of Reduction In The Rate Of Benefit Accrual Because of Age 26

B. Legislative History Demonstrates That Excluding Pre-enactment Service Years Based on Age Constitutes A Discriminatory Benefit Calculation. 36

C. Relevant IRS Pronouncements Are Consistent With The Ninth Circuit's Interpretation Of OBRA 1986, But Not Entitled To The Deference Accorded Final Substantive Regulations. 37

D. Because Spink's Construction of OBRA Has No Retroactive Effect, the Presumption Against Retroactivity Does Not Apply. 39

E. Even If the Court Were to Deem Spink's OBRA Construction To Be Retroactive, Congress' Intent To Apply It In That Manner Arises From OBRA's Clear Language Read In the Context of ERISA's History 44

CONCLUSION 45

TABLE OF AUTHORITIES

FEDERAL CASES

AARP v. EEOC,
655 F.Supp. 228 (D.D.C. 1987), rev. & remanded,
823 F.2d 600 (D.C. Cir. 1988) 25, 28

AARP v. Farmers Group, Inc.
943 F. 2d 996 (9th Cir. 1991) 25

Admin. of Tulane Educational Fund v. Shalala,
987 F.2d 790 (D.C. Cir. 1993), cert. denied,
114 S.Ct. 740 (1994) 41

Akers v. Palmer, 71 F.3d 226 (6th Cir. 1995) 21

Amato v. Western Union Int'l, Inc.,
773 F.2d 1402 (2d Cir. 1985), cert. dismissed,
474 U.S. 1113 (1986) 20

Assoc. of Accredited Cosmetology v. Alexander,
979 F.2d 859 (D.C.Cir. 1992) 41

Astor v. International Business Machines Corp., 7
F.3d 533 (6th Cir. 1993) 13

Averhart v. U.S. West Management Pension Plan,
46 F.3d 1480 (10th Cir. 1994) 21, 22

Bass v. Retirement Plan of Conoco, Inc.,
676 F.Supp 735 (W.D. La. 1988) 12

Belade v. ITT Corp.,
909 F.2d 736 (2d Cir. 1990) 22

Bigger v. American Commercial Lines,
862 F.2d 1341 (8th Cir. 1988) 20

Bolton v. Commissioner of Internal Revenue,
694 F.2d 556 (9th Cir. 1982) 38

Table of Authorities continued

Campos v. INS, 16 F.3d 118 (6th Cir. 1994) 41

Caspari v. Bohlen, 114 S.Ct. 948 (1994) 6

Chevron USA v. Natural Resources Defense Counsel,
467 U.S. 837, 104 S.Ct. 2778 (1984) 38-39

Chicago & Alton Railroad Company v. Tranbarger,
238 U.S. 67, 35 S.Ct. 678 (1915) 39, 40

Cirillo v. Arco Chemical Co.,
862 F.2d 448 (3rd Cir. 1988) 13

Claridge Apartments Co. v. Commissioner of Internal
Revenue, 323 U.S. 141, 65 S.Ct. 172 (1944) 42

Commissioner v. Keystone Consolidated Indus., Inc.,
508 U.S. 152, 113 S. Ct. 2006 (1993) 7, 8

Cox v. Hart, 260 U.S. 427, 43 S.Ct. 154 (1922) 39

Curtiss-Wright Corp. v. Schoonejongen,
__ U.S. __, 115 S. Ct. 1223 (1995) 9, 15

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979) 9

Dartt v. Shell Oil Co.,
539 F.2d 1256 (10th Cir. 1976), aff'd, 434
U.S. 99 (1977) 35

Davidson v. Canteen Corp.,
957 F2d 1404 (7th Cir. 1992) 29

Delgrosso v. Spang and Co.,
769 F.2d 928 (3rd Cir. 1985), cert. denied,
476 U.S. 1140, 106 S.Ct. 2246 20

DiCioccio v. Duquesne Light Company,
911 F.Supp. 880 (W.D. Pa. 1995) 29, 32

Table of Authorities continued

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir.), cert. denied,
459 U.S. 1069, 103 S.Ct. 488 (1982) 10

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983), cert. denied,
467 U.S. 1251, 104 S.Ct. 3533 9

EEOC v. State of Maine,
644 F.Supp. 223 (D.Me. 1986), aff'd, 823 F.2d
542 (1st Cir. 1987) 24

EEOC v. Minneapolis Police Relief Assn'n.,
645 F. Supp. 367 (D. Minn. 1986) 25

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 20

Fletcher v. Kroger Co.,
942 F.2d 1137 (7th Cir. 1991) 12

Fort Halifax Packing Co. v. Coyne,
482 U.S. 1 (1987) 10

Fremont v. McGraw-Edison Company,
606 F.2d 752 (7th Cir. 1979), cert. denied,
445 U.S. 951, 100 S.Ct. 1599 (1979) 45

Greene v. United States,
376 U.S. 149, 84 S.Ct. 615 (1964) 42

Harlan v. Sohio Petroleum Co.,
677 F.Supp. 1021 (N.D.Cal. 1988) 13

Hickerson v. Velsicol Chemical Corp.,
778 F.2d 365 (7th Cir. 1985), cert. denied,
479 U.S. 815, 107 S.Ct. 70 (1986) 19

Table of Authorities continued

Hozier v. Midwest Fasteners, Inc.,
908 F.2d 1155 (3rd Cir. 1990) 15

Izzarelli v. Rexene Products Co., 24 F.3d 1506
(5th Cir. 1994) 20, 22

Johnson v. Georgia-Pacific Corporation, 19 F.3d
1184 (7th Cir. 1994) 21

Johnson v. Mayor and City Council of Baltimore,
637 F. Supp. 903 (D. Md. 1986) 25

Kaiser Aluminum & Chemical Corp. v. Bonjorno,
494 U.S. 827, 110 S.Ct. 1570 (1990) 43

Kayes v. Pacific Lumber Co.,
51 F.3d 1449 (9th Cir. 1995), cert. den., __
U.S. __, 116 S. Ct. 301 (1995) 18

Koenig v. Intercontinental Life Corp.,
880 F.Supp. 372 (E.D.Pa. 1995) 32

Kross v. Western Elec. Co., Inc.,
701 F.2d 1238 (7th Cir. 1983) 24

Landgraf v. USI Film Prods.,
114 S.Ct. 1483 (1994) .... passim

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 12

Lowen v. Tower Asset Management, Inc.,
829 F.2d 1209 (2d Cir. 1987) 8, 9

M & R Investment Co., Inc. v. Fitzsimmons,
685 F.2d 283 (9th Cir. 1982) 9

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134, 105 S.Ct. 3085 (1985) 7, 8

Table of Authorities continued

Matter of Appletree Markets, Inc., 19 F.3d 969 (5th Cir. 1994) 39

McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13 (1st Cir. 1993) 42, 43

Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454 (6th Cir. 1984) 20, 22

NLRB v. Amax Coal Co., 453 U.S. 322, 101 S.Ct. 2789 (1981) 18

Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723 (1980) 45

New York Cent. & Hudson River R.R. Co. v. U.S. (No.2), 212 U.S. 500, 29 S.Ct. 309 (1908) 42

Oakley v. City of Longmont, 890 F.2d 1128 (10th Cir. 1989) 38

Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986) 16

Puckett v. United Air Lines, Inc., 705 F.Supp. 422 (N.D. Ill. 1989) 25, 41

Republic National Bank of Miami v. U.S., 113 S.Ct. 554 (1992) 43

Rettig v. Pension Ben Guar. Corp., 744 F.2d 133 (D.C. Cir. 1984) 35

Reynolds v. United States, 292 U.S. 443, 54 S.Ct. 800 (1934) 42

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) 22

Table of Authorities continued

Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173 (1st Cir. 1995) 13

Smith v. CMTA-IAM Pension Trust, 654 F.2d 650 (9th Cir. 1981) 45

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) 35

Society for Propagation of the Gospel v. Wheeler, 22 F.Cas. 756 13156 (C.C.D.N.H. 1814) 39

Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert denied, 467 U.S. 1205 (1984) 15

Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980) 38

Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987), cert denied, 485 U.S. 1022 (1988) 12

U.S. E.P.A. v. New Orleans Public Service, Inc., 826 F.2d 361 (5th Cir. 1987) 41

United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 102 S.Ct. 1226 (1982) 14, 19

United States v. Security Indus. Bank, 459 U.S. 70, 103 S.Ct. 407 (1982) 42

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976) 42

Varity Corp. v. Howe, 1996 U.S. LEXIS 1954 (March 19, 1996) 16, 18, 23

Table of Authorities continued

Yee v. City of Escondido, Cal.,
112 S.Ct. 1522 (1992) 6

STATUTES and REGULATIONS

Age Discrimination in Employment Act ("ADEA")

29 U.S.C. §§ 621 24

29 U.S.C §623(a)(1) 24

29 U.S.C. § 623(i)(1) 27

29 U.S.C. § 623(i)(2) 30

29 U.S.C. § 623(j)(1)(A) 2

29 U.S.C. §623(i)(1)(A) 26

Employment Retirement Income Security Act of 1974 ("ERISA")

29 U.S.C. § 1001(a) 18

29 U.S.C. §1001(b) 7

29 U.S.C. § 1002(21)(A) 16, 25

29 U.S.C. § 1002(21)(A)(i) 17

29 U.S.C. § 1002(21)(A)(iii) 23

29 U.S.C. § 1002(23)(A) 30

29 U.S.C. § 1052 24

29 U.S.C. §1054(a)(1) 2

29 U.S.C. § 1054(b)(1) 30

Table of Authorities continued

29 U.S.C. § 1054(b)(1)(H)(i) . . . . passim

29 U.S.C. § 1054(b)(1)(H)(ii) 37

29 U.S.C. § 1054(b)(4)(A) 29

29 U.S.C. § 1054(h) 29

29 U.S.C. § 1103(c)(1) 2, 7

29 U.S.C. § 1104(a)(1)(i) 7

29 U.S.C. § 1104(a)(1)(D) 9

29 U.S.C. § 1105 9

29 U.S.C. § 1105(a)(3) 19

29 U.S.C. § 1105(c)(2)(B) 19

29 U.S.C. § 1106 18

29 U.S.C. § 1106(a)(1) 8

29 U.S.C. § 1106(a)(1)(D) 2

29 U.S.C. § 1106(b) 8

Older Workers' Benefit Protection Act ("OWBPA")

Pub. L. No. 101-433, 104 Stat 978 (1990) 12

Omnibus Budget Reconcilation Act of 1986 ("OBRA")

Pub. L. No. 99-509, 100 Stat 1973 (1986) 26

§ 9201 26

Table of Authorities continued

§ 9202 26

§ 9203 26

§ 9203(a) 33

§ 9203(a)(1) 36

§ 9203(b) 33

§ 9204 26

§ 9204(a) 27, 34, 35

§ 9204(a)(1) 43

§ 9204(b) 33, 34, 35

Regulations

29 C.F.R. § 860.120(f)(iv)(B) 28

52 Fed. Reg. 45,360 (1987) 37

53 Fed. Reg. 11,877 (1988) 38

54 Fed.Reg. 604 (1989) 38

IRS Notice 88-126, 1988-2 C.B. 538 (1988) 38

Labor Reg. § 2540.204-3 30

Prop. Treas. Regs. § 1.411(b)-2 (1988) 37-38

Table of Authorities continued

Legislative History

H.R.Rep. No. 99-1012, 99th Cong., 2d Sess. 379
(1986), reprinted in 1986
U.S.C.C.A.N. 4019 .... 25, 30, 35, 36, 37

S.Rep. No. 93-127 (1973), reprinted in 1974
U.S.C.C.A.N. 4639 35

OTHER AUTHORITIES

Supreme Court Rule 14.1 .... 4, 6

General Accounting Office, Use of Waivers by Large
Companies Offering Exit Incentives to Employees,
GAO/HRD 89-87 (1989) 14, 15

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Benefit Plans, (West Publishing 1995) 31

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STATEMENT OF THE CASE

On February 5, 1992, Respondent Paul L. Spink ("Spink") commenced this putative class action against Lockheed Corporation, certain of its corporate officers, and the members of the Retirement Plan Committee for the Lockheed Retirement Plan for Certain Salaried Employees ("Plan"),[1] asserting claims under ERISA and the ADEA. At the core of his complaint are Spink's contentions that Petitioners violated his rights and those of other plan participants by using plan assets held in trust to purchase broad waivers of liability against Lockheed, a party in interest, and by calculating pension benefits for certain older workers in a way which improperly reduced the rate of benefit accrual because of age. (JA 1, 4-29).[2]

The first issue arose when Lockheed -- a named fiduciary acting within its fiduciary duties under the Plan -- amended the Plan in 1990 to include unlawful provisions which caused the Plan to pay out assets held in trust as early retirement benefits in exchange for broad waivers of all employment-related claims against Lockheed, and then Lockheed and the Committee -- whose members are also named fiduciaries acting pursuant to their fiduciary responsibilities under the Plan -- administered the Plan according to these illegal terms, directly using plan assets for the benefit of Lockheed. (JA 7-11, 20-23, 45-47). Spink alleged in his complaint that this conduct violated ERISA's fiduciary duties set forth in § 404 and resulted in a prohibited transaction in violation of § 406(a)(1)(D). 29 U.S.C. §§ 1104,

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1/ To avoid confusion, Spink will refer to Lockheed Corporation as "Lockheed," the members of Retirement Plan Committee as "the Committee" and to all petitioners jointly as "Petitioners."

2/ Throughout this brief, the following abbreviations are used: "JA" is the Joint Appendix submitted by the parties; "Pet. Brief" refers to the Brief of Petitioners filed with this Court on or about February 29, 1996; "ER" refers to the Excerpts of Record filed with the Ninth Circuit in connection with the appeal; and "CR" followed by a number refers to the Clerk's Record, with reference to the docket number of the document identified. The trial court's docket sheet may be found at pages 58-59 of the Excerpts of Record.

1106(a)(1)(D). (JA 21-24). In response to Petitioners' motion to dismiss under Rule 12(b)(6), Spink argued that the challenged conduct also ran afoul of ERISA's "anti-inurement" clause in § 403. 29 U.S.C. § 1103(c)(1).

The second challenge stemmed from Petitioners' practice of excluding years of service worked before December 25, 1988 from benefit accrual calculations because of the employee's age at the time of hire. When Spink retired in 1990, the Plan employed a benefit calculation formula which used an employee's years of Credited Service as a key factor in calculating an employee's pension benefits at retirement. Credited Service included virtually all years of an employee's tenure with Lockheed. The only actual years of service excluded were those worked in plan years before 1988 by any employee who was hired during that period at a time when he or she was age 60 or older. (JA 42-44; CR 7 at 39-40, 54). Because the Plan's benefit accrual formula excluded these years of service based on age, Spink alleged that it violated proscriptions under ERISA and the ADEA against maintaining a defined benefit pension plan which "requires or permits . . . the reduction of the rate of an employee's benefit accrual, because of age." ADEA § 4, 29 U.S.C. § 623(j)(1)(A); ERISA § 204, 29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i). (JA 14-20).

Both practices challenged in this action have had a deleterious impact on Spink and those like him since the time of their retirement. Although eligible to elect the early retirement option, Spink did not do so because he did not want to waive his right to challenge the Plan's discriminatory benefit formula. After more than 11 years of continuous service with Lockheed, therefore, Spink retired on June 30, 1990 with a pension benefit of less than $100 per month because Petitioners only credited him with the last 18 months of his employment and because he could not obtain enhanced early retirement benefits without waiving his right to bring his ADEA and ERISA claims. (JA 16-17, 79).

Petitioners sought dismissal of Spink's complaint through a motion under Rule 12(b)(6) asserting failure to state a claim for relief. The district court granted the motion, entering judgment against Spink on July 31, 1992.

On appeal, the Ninth Circuit reversed in an opinion filed July 18, 1995. In overturning the district court's

dismissal of Spink's claims against Lockheed and 12 individual defendants, the Ninth Circuit held that Lockheed's act of amending the plan document together with its implementation by Lockheed and the individual defendants violated § 406(a)(1)(D) of ERISA, by requiring the plan to engage in multiple transactions using plan assets held in trust for the benefit of a party in interest.[3]

Following the analytical model enunciated by this Court in Landgraf v. USI Film Prods., __ U.S. __, 114 S.Ct. 1483 (1994), the Ninth Circuit held that the language and structure of OBRA, as demonstrated by the legislative history illuminating the text, manifested "Congress' intention that pre-enactment service years be included in calculating benefit accrual for older employees," like Spink. (JA 86). The Court never went past the first step of the Landgraf model because it found that "Congress ha[d] expressly prescribed the statute's proper reach." Id., at 1505. Nonetheless, in obiter dictum, the Court tried to resolve the parties' debate about whether Spink's interpretation of OBRA operated retroactively, opining that it did. (JA 82 n.1). Finally, while both parties urged the court to consider their view of regulatory pronouncements of the Internal Revenue Service (IRS), the Ninth Circuit "decline[d] to apply either of these interpretations" because the IRS never adopted final regulations based on its proposed interpretations. (Id. 86-87 n.3).

Lockheed filed a petition for certiorari seeking review of two questions: first, whether the Ninth Circuit erred in holding that a plan sponsor can be liable under § 406 when it amends the terms of its pension plan;[4] and second, whether

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3/ Although the Ninth Circuit focussed attention on Lockheed's argument that it could not be held liable by virtue of its act of amending alone, there is no question that the Ninth Circuit held that the amendment and its implementation violated § 406, because it reversed the dismissal of this claim as to all defendants. This ruling necessarily reaches the implementation issue since Spink has never alleged that the Committee members were involved in amending the Plan. Further, in reaching its conclusion, the Ninth Circuit discusses in detail the nature of the benefit Lockheed obtained when it was implemented. (JA 79, 87-91).

4/ Petitioners now concede that implementing a plan amendment which violates ERISA can be a fiduciary breach and that amending a plan to require such a violation might be subject to fiduciary analysis. In footnote

the Ninth Circuit was correct in construing OBRA 1986's benefit accrual provisions to bar Lockheed from calculating pension benefits for older workers by excluding certain years of service because of their age when hired.

SUMMARY OF ARGUMENT

As to the nucleus of claims asserted to challenge Lockheed's waiver for benefits exchange, the only issue raised in the Petition for Certiorari was whether a pension plan sponsor can be liable for breach of fiduciary duty under ERISA § 406 for amending the terms of its pension plan in the way Lockheed did here. All other issues discussed by Lockheed and its amici should be disregarded under Rule 14.1(a).

Lockheed's amendment mandating a participant's waiver of virtually all claims against the employer as a condition of receiving early retirement benefits paid out of plan assets held in trust violates § 406(a)(1)(D) of ERISA, which provides that a fiduciary may not "cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest of any assets of the plan." The waivers which Lockheed purchased with plan assets provided the company with a direct, non-incidental benefit, unlike the benefits which naturally flow from the administration of a retirement plan. Further, there is nothing either in the language, structure or purpose of ERISA or in the common law of trusts which supports Lockheed's argument that an amendment which disposes of plan assets within the meaning of § 406 is a "settlor" function

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11, Petitioners state, contrary to the position taken in their petition, that the act of amending would be a fiduciary act if the "Plan amendment purported to direct the fiduciaries to engage in conduct that violated some other provision of ERISA," including the fiduciary statutes, provided that "the fiduciaries followed the [new] terms of the plan." (Compare Pet. Brief 19 n. 11 with Pet. 7). Petitioners also assert in the same footnote that, since no provision of ERISA prohibits the payment of pension benefits to eligible participants, this case involves no such issue. As Spink discusses in Section II-A, however, the amendment here directs a prohibited transaction. Thus, this case involves exactly the type of amendment which Lockheed has apparently conceded is subject to fiduciary analysis.

falling outside the definition of a fiduciary under § 3(21)(A) of ERISA. This is particularly true here where Lockheed acted as a named fiduciary exercising its fiduciary duties under the Plan.

On the second question presented, the language, structure, purpose and legislative history of the benefit accrual provisions of OBRA all point to the conclusion that it is a violation of federal prohibitions against reducing an employee's "rate of benefit accrual" because of age under ERISA and the ADEA for a plan to use a benefit formula which excludes any years of service because of age -- even those years when an older worker was lawfully excluded from participation prior to OBRA 1986. Nothing in OBRA 1986 permits or requires the exception Petitioners would carve out for participants in Spink's shoes. Moreover, such an interpretation conflicts with the remedial goals of OBRA and the statutes it amends.

Even if Congress had not made its intent so clear, since the application urged by Spink is not retroactive, Lockheed may not invoke the presumption against retroactivity. Instead any statutory ambiguity must be resolved in favor of broad coverage and protection against discrimination. What is more, any presumption of retroactivity is rebutted by Congress' clear intent.

ARGUMENT

I. THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION SET FORTH IN LOCKHEED'S PETITION.

The Question Presented in the Petition for Certiorari is a narrow one which encompasses only part of the Ninth Circuit's holding: whether a pension plan sponsor can be liable for breach of fiduciary duty under ERISA § 406 for amending the terms of its pension plan in the way Lockheed did here. But it differs in important respects from the issue asserted at the outset of Petitioners' Brief.

Petitioners unfairly attempt to expand the original Question Presented beyond the amendment issue to sweep in Spink's distinct claims against Lockheed and the individual

petitioners, not for any role they had in amending the Plan, but for their implementation of the Plan amendment. While these implementation claims may be "complementary to" or "related to" the amendment issue raised in the Petition, they are not "fairly included therein" within the meaning of this Court's Rule 14.1(a), and thus may not be presented for consideration by this Court.[5] Yee v. City of Escondido, Cal., 112 S.Ct. 1522 (1992); Caspari v. Bohlen, 114 S.Ct. 948, 952 (1994).

In addition, despite the fact that the Ninth Circuit explicitly chose not to address Spink's "anti-inurement" argument, his fiduciary claims under ERISA § 404, or his equitable estoppel argument[6] (JA 78, 88 n. 5); Petitioners improperly ask this Court to remand the case "with instructions to affirm in all respects the decision of the district court," thus implicitly raising issues which are clearly not before this Court. (Pet. Brief 48). Finally, one amicus would have this Court decide another issue not before it, i.e., whether a party in interest, as opposed to a fiduciary, may be held liable for engaging in a prohibited transaction. None of these are "fairly included" in Petitioners' initial Question Presented.

Had these issues been raised in the Petition, Spink could have successfully opposed granting review on a number of grounds not addressed in his opposition. Because these issues are distinct from the amendment question actually raised in the Petition, this Court should decide only the question on which it granted review.

5/ Implementation of the amendment was never mentioned in the Petition for Certiorari.

6/ To recruit Spink from his job at Hughes Helicopters in 1979, at the time he was hired, Lockheed told him that he would be covered by its retirement plan and for the next 4 years he received written year-end statements which showed him accruing years of Credited Service. (JA 78).

II. LOCKHEED ENGAGED IN A PROHIBITED TRANSACTION IN AMENDING ITS PLAN TO DIRECT PLAN FIDUCIARIES TO USE PLAN ASSETS BY AND FOR ITS BENEFIT.

While Lockheed and its amici raise a dizzying array of justifications for Lockheed's purchase of waivers with Plan assets, the question before this Court ultimately turns on relatively simple principles about what employers and fiduciaries can and cannot do with assets they hold in trust, the issue which most concerned legislators in passing ERISA. As this Court has noted, "[T]he crucible of congressional concern was the misuse and mismanagement of plan assets by plan administrators." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n. 8, 105 S.Ct. 3085, 3090 n. 8 (1985) (emphasis added).

ERISA explicitly prohibits the type of transaction which took place here and it does so without regard to any false distinction between whether this transaction was initiated at the discretion of the Plan Committee or other Plan fiduciaries or occurred merely as the result of these fiduciaries "implementing" a plan amendment adopted by Lockheed as a named fiduciary. In fact, ERISA is much more concerned with the "end" of protecting retirement plan monies held in trust from any possible use by or for a plan sponsor or employer than it is with the "means" by which such a prohibited transaction takes place.

Thus, ERISA focuses on defining "prohibited transactions" by reference, not to the method by which such transactions are initiated, but rather by listing types of transactions which are prohibited. Commissioner v. Keystone Consolidated Indus., Inc., 508 U.S. 152, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan.")[7] Section 406 enumerates these prohibited transactions, including various transactions between a plan and a "party in

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7/ The guiding principle of ERISA is set forth throughout the statute. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1); ERISA § 2, 29 U.S.C. § 1001(b); ERISA § 404(a)(1)(i), 29 U.S.C. § 1104(a)(1)(i).

interest."[8] ERISA § 406(a)(1)(A)-(E), 29 U.S.C. § 1106(a)(1)(A)-(E). Cf. ERISA § 406(b), 29 U.S.C. § 1106(b) (breach where fiduciary deals with plan assets "in his own interest" or on behalf of party with interests adverse to the plan or its participants).

In order to safeguard retirement benefits, Congress went beyond common law trust theory by statutorily defining persons or entities deemed as a matter of law to exercise too much potential influence over Plan trustees.[9] Referring to such entities as "parties in interest," ERISA absolutely prohibits transactions in which a fiduciary "cause[s] the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . (D) transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. . . ." Section 406(a)(1)(D) (emphasis added).

Engaging in any such transaction constitutes a per se violation of ERISA, without respect to why or how the plan came to be doing business with the "party in interest."[10] M &

8/ All parties concede Lockheed is a "party in interest."

9/ While traditional trust theory generally requires trustees to avoid transactions in which their judgment might be unduly influenced by their relationship to third parties, "Congress was apprehensive that exceptions to the common law rules against self-dealing were unduly eroding the underlying principle and included Section 406 as a barrier to such erosion." Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1215 (2d Cir. 1987) (citing S.Rep. No. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4865).

10/ Congress made such transactions per se violations of ERISA to safeguard the financial integrity of plans and to ensure that adequate resources would be available to pay promised benefits. Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152. The courts and case books are filled with cases in which retirees lost benefits for which they worked a lifetime, either through dissipation of plan assets, failures to meet Congressional funding minimums, changes in the value of assets held in trust, or because there is nothing magic in the minimum funding levels set by Congress. It is because the economic future is uncertain and the assets employers hold in trust are the only real world guarantee that promised benefits will ever be paid, that ERISA is so concerned with how fiduciaries deal with trust assets. Massachusetts Mut. Life Ins. Co. V. Russell, 473 U.S. at 141 n. 8.

R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982).[11] ERISA holds fiduciaries responsible for ensuring such transactions do not take place, instructing them that ERISA's prohibitions trump any contrary instructions in Plan documents. ERISA § 404(a)(1)(D) & 405, 29 U.S.C. § 1104(a)(1)(D) & 1105; Cf. Curtiss-Wright Corp. v. Schoonejongen, __ U.S. __, 115 S. Ct. 1223, 1230 (1995) (plan administrator's duty may include responsibility to sort out "bona fide amendments" from amendments which are not).

Recognizing the all-encompassing scope of § 406 and the need to permit certain transactions which would actually benefit plan participants, Congress established statutory and administrative exemptions to the prohibited transaction rules. Certain recurrent transactions necessary to running most retirement plans were exempted under § 408(b), including, for example, contracting with a party in interest to render accounting services for the plan which is exempted under § 408(b)(2).[12] In addition, ERISA § 408(a) provides that a plan or a party in interest may request a review of any proposed transaction by the Department of Labor and allows the Secretary of Labor to issue exemptions for entire classes of recurring transactions.[13]

Despite the fact that the challenged amendment clearly provided for a quid pro quo in which assets held in trust were exchanged for waivers of corporate liability, Lockheed and its amici attack the Ninth Circuit's holding that this arrangement constitutes a prohibited transaction.[14]

11/ See also Lowen v. Tower Asset Management, Inc., 829 F.2d at 1213; Donovan v. Cunningham, 716 F.2d 1455, 1464-1465 (5th Cir. 1983); Cutaiar v. Marshall, 590 F.2d 523, 528 (3d Cir. 1979).

12/ ERISA is concerned with all expenditures of plan assets right down to the costs of administering the plan. ERISA § 404(a)(1)(A)(ii).

13/ Petitioners have never sought such an exemption.

14/ Indeed, the U.S. Chamber of Commerce goes so far as to argue that paying benefits to participants violates ERISA § 406(a)(1)(D), which can only be accomplished via the statutory exception created by § 408(b)(9). (Ch. Brf. 6-7). This misreads the statute by confusing payments to an "employee," who is also a party in interest, with payments to a retired

They argue either that the transaction produced no real benefit to Lockheed or that the type of benefit it produced is indistinguishable from other, non-prohibited benefits. They also contend that, even if there were a prohibited benefit, Lockheed cannot be held liable under § 406 because amending a plan can never be a fiduciary act.[15]

A. Lockheed's Amendment Caused The Plan To Use Plan Assets For the "Benefit" of A Party in Interest.

While employers are under no obligation to offer retirement plans at all, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987), once assets have been placed in trust for a company's employees, employers lose any claim on them. ERISA § 403(c)(1). As the structure and provisions of ERISA and relevant case law make clear, employers may only benefit from such assets to the extent that such "benefits" flow as natural and unavoidable consequences of offering retirement plans to their employees, i.e., whatever consequences flow, without more, from: (a) offering retirement benefits to employees or prospective employees; (b) retirement of employees, or (c) payment of benefits. In § 404 cases, such benefits have been termed "incidental" not because they are small or insignificant but because they are natural incidents of the administration of pension plans.[16]

"participant," who is not. (U.S. Brief 15, n.10).

15/ Lockheed also argues the amendment cannot be a prohibited transaction as the amendment itself is not a "transaction" (Pet. Brief 22-23), but § 406 does not require that the offending fiduciary be present in the transaction, merely that the fiduciary "cause the plan to engage in a [prohibited] transaction." ERISA § 406(a)(1)(D). The amendment clearly "caused" a transaction between the Plan and its participants, allowing Lockheed to "indirectly" use plan assets to obtain waivers.

16/ Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (In case coining phrase "incidental benefit," Judge Friendly noted that although corporate officers who are also plan trustees do not violate their fiduciary duties in taking what they consider to be best action, after "careful and impartial investigation", simply because that action "incidentally benefits" the corporation or themselves, their decisions must be made with "eye

Lockheed and its amici argue that the challenged waiver is indistinguishable from benefits which plan sponsors routinely receive in return for paying retirement benefits, such as: (1) attracting or retaining employees (2) deferring employee compensation; (3) settling collective bargaining disputes or avoiding strikes; (4) providing increased compensation without impacting corporate cash flow or in lieu of wage increases; (5) increasing turnover; or (6) reducing the likelihood of lawsuits by former employees who receive early retirement benefits rather than simply being laid off. (E.g., Pet. Brf. 26-28; Chamber Brf. 9-11; ERIC Brf. 25-27). Yet all of these benefits flow directly from the act of having a pension plan and paying benefits, quite different from Lockheed's use of plan assets pursuant to the amendment to barter with retiring employees for various chose in action.

In responding to Lockheed's argument that the waivers provided it with no benefit at all (JA 90-91), the Ninth Circuit found the waivers actually provided Lockheed a "significant benefit." Lockheed argues this analysis undermines the "bright line" test Congress intended for prohibited transactions under § 406. (Pet. Brf. 23-24; Chamber Brf. 16-22). Apparently hoping to eviscerate the statute entirely, Lockheed offers no real way to distinguish those benefits which give rise to a § 406 violation from those a company may enjoy without running afoul of ERISA. Rather they argue that plan sponsors should be free to reap any benefits they desire, so long as transactions begin with plan amendments and involve paying benefits to plan participants at some point in the transaction.[17] This "bright

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single to the interests" of plan participants and beneficiaries, which creates duty to avoid placing themselves in a position where acts as corporate officers "would prevent functioning with complete loyalty to participants.")

17/ Given this analysis, it is difficult to understand why amicus ERISA Industry Committee (ERIC) stops short of advocating open raiding of surplus assets in the hypothetical set forth in footnote 25 at page 26 of its brief. Nothing in Lockheed's or ERIC's analysis would stop a company from adopting an amendment to provide retirees with an extra $2,000 per month in benefits, conditioned on an "eligibility requirement" that these

line" rule is so expansive that it would obliterate § 406 protections entirely.

That Lockheed violated ERISA in using plan assets to buy waivers of corporate liability is supported by the case law. A review of cases holding that employers received only "incidental benefits" as a result of using plan assets to induce or discourage retirement leads inevitably to the conclusion that benefits which arise directly out of the process of maintaining and administering a pension plan, including paying benefits, will be determined to be "incidental" while benefits arising from other sources will be deemed "non-incidental" or "direct" benefits.[18] Applying these standards, it is easy to see that an employee's release of all claims she may have against Lockheed -- including toxic tort claims, sexual harassment complaints, discrimination charges, and other potential disputes -- does not flow naturally from plan administration but instead is a separate and distinct benefit to Lockheed which liquidates the employee's potential damages, as well as Lockheed's possible defense costs. Such an exchange directly benefitted Lockheed as prohibited by § 406.

Although Lockheed claims the kinds of benefits it purchased with Plan assets were expressly authorized by Congress in the Older Workers' Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat 978 (1990), this is simply not true. Far from endorsing or even addressing the use of plan assets to obtain waivers, OWBPA was designed to prevent employers from taking advantage of older workers through the improper use of waivers, not to sanction

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retirees execute an assignment of $1,500 per month back to the company.

18/ Compare Fletcher v. Kroger Co., 942 F.2d 1137, 1140 (7th Cir. 1991) (increased efficiency of operation is incidental benefit); Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987) (same); Bass v. Retirement Plan of Conoco, Inc., 676 F.Supp 735, 744-745 (W.D. La. 1988) (workforce reduction is incidental benefit), with Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) (finding direct benefit in ERISA violation where plan assets invested in corporations which were takeover targets in order to increase price of stock which defendants owned).

employers' use of pension assets held in trust to buy off unrelated litigation liabilities.[19] (See AARP Brf. Section I).

Nor does the case law shore up Lockheed's defense of its waiver. None of its "waiver" cases involve a claim that the employer, trustees or any other fiduciary violated Section 406(a)(1)(D), or deal with the exchange of pension trust assets for waivers. Instead they concern employees who signed releases in exchange for severance pay or unfunded welfare benefits. Thus, they provide no guidance regarding the resolution of the key issue before this Court.[20]

As a matter of policy, Lockheed and its amici project that the Ninth Circuit's ruling will have a cataclysmic impact on labor relations, the discretion of employers to make business decisions, and the smooth administration of pension plans throughout the nation. These projections are either exaggerated or inapposite.

Petitioners argue that the Ninth Circuit's decision "declares illegal a longstanding and widespread practice." (Pet. 25). In light of the Ninth Circuit's statement that "Lockheed is free to disregard employees' interest in amending the Plan," it cannot be said that the decision below places any limitation on an employer's ability to amend their plan as part of the settlement of a collective bargaining dispute, to avoid a strike, or in the other contexts raised by

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19/ Nor do the Treasury regulations on covenants not to compete provide any support for Petitioners' position. (U.S. Brief 22, n. 15).

20/ See, e.g., Harlan v. Sohio Petroleum Co., 677 F.Supp. 1021, 1026 (N.D.Cal. 1988) (court noting that "[t]his is not a situation where the plan had already been in effect, and the defendant [employer] sought to condition the benefits on a later required release," in holding § 404 does not apply to the "creation" of a new welfare benefit plan which required releases as a condition of participation); Astor v. International Business Machines Corp., 7 F.3d 533, 534-6 (6th Cir. 1993) (plaintiffs never challenged newly-funded early retirement program's waiver requirement, instead claiming fraudulent inducement); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173 (1st Cir. 1995) (plaintiff signed release in return for receiving severance pay from defendant company and participating in various unfunded ERISA welfare plans); Cirillo v. Arco Chemical Co., 862 F.2d 448 (3rd Cir. 1988) (not brought under ERISA; sole issue was whether employee executed a "knowing and voluntary" waiver of ADEA rights).

Petitioners. (JA 89). Instead it simply affirms established Supreme Court law that the terms of any such amendment cannot violate substantive provisions of ERISA. United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 102 S.Ct. 1226 (1982).

Nor is there anything in the Ninth Circuit's decision which would outlaw any form of early retirement program except those which require employees to relinquish all rights they may have to sue their employer in order to obtain benefits which are paid out of pension funds held in trust. It does not bar employers from providing enhanced benefits out of plan assets without requiring a waiver of all claims. Nor does it prevent an employer from financing such a program with its own assets.

Because of its narrow holding, the Ninth Circuit's decision will have very little effect on early retirement incentive programs as they are used by the vast majority of businesses in the United States. While it seems that such programs are used by some companies and that a small proportion of them request waivers in exchange for the early retirement benefits, it is clear that few employers have followed Lockheed's lead by dipping into plan assets held in trust -- as opposed to their own corporate funds -- to buy waivers of employment-related claims in connection with the payment of such benefits.[21]

21/ For example, while it found that 80% of the Fortune 100 companies offered some sort of early retirement program at least one year during the period from 1979 through 1988, the U.S. Government Accounting Office (GAO) determined that only 28% of the employers with such programs required participants to sign waivers **of any sort** in order to receive benefits. See General Accounting Office Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD 89-87 at 4-5 (1989). More significantly, only about 5% of the 198,281 employees who elected to leave under early retirement programs during the relevant ten years had to sign waivers in order to receive enhanced benefits under an existing pension plan, as opposed to a newly created severance package program, and there is no indication in the report as to whether these enhanced benefits were paid out of pension assets held in trust or by a new contribution by the sponsoring employer. Id., at 7. Even assuming, arguendo, that all these benefits were paid out of assets held in trust and all of the waivers were as all-inclusive as those used by Petitioners here, according to the authorities cited in the Petition, the practice at issue here affected less than 10,000 employees out of a workforce of approximately

Even if this were not true, the law should not countenance a corporate strategy which uses plan assets held in trust as if they belonged in the coffers of the plan sponsor, merely because the strategy is accomplished by formal amendment of the plan document or by calling the transfer of assets a payment of benefits. Such a ruling would eviscerate the force of Section 406 and effectively gut the prohibitions against improper use of trust funds which constitute the foundation not only of ERISA but of long-recognized common law trust principles.

B. Lockheed Acted As a Fiduciary in Amending the Plan to Dispose of Plan Assets.

Lockheed contends it cannot be held liable as a fiduciary who "cause[d] the plan to engage in" a prohibited transaction under § 406(a)(1)(D), arguing that it did not "act in a fiduciary capacity . . . because amending the Plan to create a new retirement benefit is a settlor function, which was undertaken by Lockheed in its corporate capacity." (Pet. Brief 12). While this Court recently observed that plan sponsors are generally free under ERISA to adopt, modify, or terminate *welfare* plans, Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. at 1228, it has never addressed the issue raised by Lockheed here: whether the plan sponsor and named fiduciary acts as a fiduciary under ERISA when it amends a defined benefits *pension* plan so as to direct a disposition of plan assets held in trust which constitutes a prohibited transaction under § 406.[22]

8.3 million over a ten-year period. Id., at 4.

22/ The distinction between modifying a welfare plan and amending a pension plan is a significant one in the context of an alleged § 406 violation. Unlike with pension plans, ERISA does not impose any minimum participation, vesting or funding requirements on welfare plans, so there is no issue of a separate fund which is held in trust. Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. at 1228; Hozier v. Midwest Fasteners, Inc., 908 F.2d at 1158-1162, esp. 1159 (3d Cir. 1990) ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust."); Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406, 411 (4th Cir. 1983) ("unfunded nature" of employer's liability distinguished from cases,

Just this month, this Court provided the model for analyzing whether an employer's conduct falls within the scope of a fiduciary's role under ERISA and, thus, is subject to scrutiny as a potential violation of its fiduciary duty provisions. Varity Corp. v. Howe, 1996 U.S. LEXIS 1954 (March 19, 1996), slip op. at 5-6. The Court explained that ERISA's general fiduciary duties and related statutes, including the definition of "fiduciary" in § 3(21), must be interpreted and applied by reference not only to the text and purpose of ERISA but also to the common law of trusts and the duties imposed under the trust document.[23]

Looking first to the relevant language in § 3(21)(A), "a person is a fiduciary with respect to a plan to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice . . . , or has any authority to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.

29 U.S.C. § 1002(21)(A). The language indicates, inter alia, that a person may be a fiduciary either because his *conduct* is such that he "exercises" certain authority or control over the plan, or because his *status* is such that he "has" any authority or responsibility in the administration of the plan, whether or not the authority or responsibility is exercised or carried out.

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where courts have found that fiduciaries have violated § 406); Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986).

23/ In so doing, the Court "recognized that [while ERISA's] fiduciary duties draw much of their content from the common law of trusts, . . . ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protections." Id., at 6. Thus, trust law will "offer only a starting point, after which the courts must go on to ask whether, or to what extent, the language of the statute, its structure, and its purposes require departing from common-law trust requirements." Id., at 7.

Spink contends that Lockheed is a fiduciary under subclause (i) because, in amending the plan, it exercised actual authority and control over the management and disposition of plan assets, and under subclause (iii), because, as a named fiduciary under the Plan, it "ha[d] discretionary authority or discretionary responsibility in the administration of such a plan," including the assigned duties of amending the plan, ensuring its qualification under law, and designating members of the Committee to administer the Plan. (JA 46).

1. By Amending the Plan, Lockheed Exercised Actual Control Over the Disposition of Plan Assets.

Nothing in § 3(21)(A) supports Lockheed's argument that amending a plan may never be a fiduciary act. There are no references in the section or in any other part of ERISA to the status, role or functions of a "settlor," nor any statutory language which marks the act of plan amendment as outside the scope of fiduciary duties. On the contrary, one who "exercises" authority or control can do so in any number of ways, and no language in § 3(21)(A) distinguishes fiduciary methods of exercising power over plan assets from non-fiduciary ones. A fiduciary is one who exercises "any" kind of authority or control over plan assets in any way. It is plain that one who amends a plan to direct the administrators to dispose of plan assets in a particular way has exercised control over the "management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(i).

Lockheed suggests this phrase should be read to exclude any powers traditionally reserved to the settlor under common law trust analysis. But even under common law, Lockheed would not have had the power to amend the plan in the way it did. Whether in creating a new trust or in amending the provisions of an existing one, the settlor cannot establish a provision which "run[s] counter to any rule or policy of the law"; any such provision would be invalid and unenforceable. I Fratcher, Scott on Trusts, § 4, p. 53 (4th ed. 1989). The settlor is, therefore, without power to impose a trust provision if its enforcement would be contrary to law, including if it "involves a disposition of the trust property in

a manner which is against public policy." Restatement of Trusts, § 62, pp. 162, 166.

While there may or may not be reasons to exclude certain settlor functions from the broad scope of "fiduciary" duties under ERISA,[24] the common law provides no justification for carving out "settlor" conduct when it results in an amendment directing that trust assets be disposed of in a way which is contrary to the law. An exception which condoned such an amendment as within the settlor's prerogative would render ERISA's protections less substantial than those under common law -- a result which would flatly contradict Congress' intent in passing ERISA. Varity Corp. v. Howe, slip op. at 6; 29 U.S.C. § 1001(a).

Rejection of Lockheed's "amendment" exception to fiduciary status under § 3(21)(A)(i) is also consistent with related provisions of ERISA. Violations of § 406 occur when there is a "direct or indirect" disposition or use of trust assets which is contrary to federal public policy and law because it is a transaction involving the plan and a party in interest or a fiduciary's self-dealing.[25] ERISA § 406, 29 U.S.C. § 1106. It would be strange indeed if the entity who used its authority to initiate and direct such a disposition of assets -- as did Lockheed here -- were considered a non-fiduciary and, thus, immune from fiduciary liability, even though its conduct led to or "cause[d]" an illegal "disposition of assets" when the plan amendment was implemented. This result would completely undermine "the fiduciary requirements of ERISA [which] specifically insulate the trust from the employer's interest." NLRB v. Amax Coal Co., 453 U.S. 322, 333, 101 S.Ct. 2789 (1981).

24/ Since the violation of ERISA's "prohibited transaction" rule is the essence of Spink's claim against Lockheed under § 406(a)(1)(D) and the only fiduciary issue as to which this Court granted certiorari, there is no reason in this case to address the broader issue posed by Lockheed and its amici as to whether an employer has unlimited power to amend a plan to add eligibility criteria which do not violate ERISA.

25/ Cf., Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995), cert. den., __ U.S. __, 116 S. Ct. 301, 1467-68 (1995) (fiduciaries' indirect use of surplus plan assets as collateral to obtain loan to finance takeover constituted prohibited transaction even though assets were never at risk).

Such a construction not only robs § 406(a) of its force, it undermines the vitality of a related fiduciary provision. Under § 405(a)(3) and (c)(2)(B), a plan fiduciary is liable for the breach of fiduciary duty by another fiduciary if he has knowledge of the breach but fails to make "reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a)(3) and (c)(2)(B). Like a co-fiduciary who is liable under these provisions, an employer who amends a plan to add an illegal provision necessarily knows of the administrator's eventual breach in implementing the amendment but does nothing to prevent or remedy it. It makes no sense that ERISA would impose "co-fiduciary" liability on Lockheed for its mere knowledge and failure to act, while excusing its actual exercise of power in amending the plan to add an illegal term.[26]

Spink's contention that Lockheed acted as a fiduciary here is also borne out by case law. This Court has recognized that, while basic eligibility rules in a collectively-bargained pension plan are not subject to scrutiny for their reasonableness, plan administrators breach their fiduciary duties when they maintain plan terms which violate federal law. "The substantive terms of [such] employee benefit plans must comply with the detailed and comprehensive standards of the ERISA," including presumably § 406's prohibition against "party in interest" transactions. UMW v. Robinson, 102 S.Ct. at 1234.

Several courts of appeals have evaluated amendments disposing of plan assets under applicable fiduciary standards. In Hickerson v. Velsicol Chemical Corp., 778 F.2d 365 (7th Cir. 1985), the Seventh Circuit rejected the argument that an

26/ ERISA § 405(c)(1) and (2) demonstrate the untenable nature of Lockheed's argument that plan design can never involve fiduciary acts in another way. These sections concern the plan adoption of written procedures allocating fiduciary responsibilities amongst named fiduciaries or allowing named fiduciaries to designate persons other than themselves to carry out fiduciary responsibilities. ERISA § 405(c)(2) provides that, if a plan "expressly provides" for such a procedure and a fiduciary follows that procedure in allocating or designating fiduciary responsibilities, then such named fiduciary shall not be liable for the acts or omissions of the person carrying out such responsibilities, unless, inter alia, the named fiduciary violated § 404(a)(1) fiduciary duties in the "establishment" of the written procedure. ERISA § 405(c)(2)(A)(ii).

amendment converting the employer's profit-sharing plan to a defined benefit pension plan was beyond fiduciary scrutiny, noting that "[p]lan trustees are fiduciaries under a strict duty to deal with the funds entrusted them solely to the benefit of plan participants," and thus may not use plan amendments "in an attempt to generate a windfall through conversion." Id., at 377.[27] See Amato v. Western Union Int'l. Inc., 773 F.2d 1402, 1417 (2d Cir. 1985), cert. denied, 474 U.S. 1113 (1986) (conspiracy to enact and implement the Plan amendment to create surplus for use of plan fiduciaries stated claim for breach of fiduciary duty); Delgrosso v. Spang and Co., 769 F.2d 928 (3rd Cir. 1985) (plan sponsor violated fiduciary duties under § 404 by amending pension plan to provide for reversion of assets to itself); Eaves v. Penn, 587 F.2d 453, 458 (10th Cir. 1978).

Even the cases relied on by Lockheed establish that a plan sponsor's power to amend the plan may not be exercised to include plan provisions which violate the substantive terms of ERISA.[28] As a result, the courts in those cases go beyond the initial question of whether the amendment process may be scrutinized as a fiduciary act to determine

27/ Contrary to the suggestion of ERIC, nothing in Hickerson or any cited case involving a spinoff benefits plan permits Lockheed to use plan assets held in trust to buy off litigation liabilities either as a condition to receiving benefits or as a promised reward for a litigation release. Hickerson erects a fiduciary barrier to such raids on plan assets and the other cases simply do not confront a plan sponsor's improper use or looting of assets. E.g. Bigger v. American Commercial Lines, 862 F.2d 1341 (8th Cir. 1988) (although "ERISA imposes fiduciary duties upon pension sponsors," spin-off did not violate ERISA because it complied with § 208 in transferring assets from one plan to another).

28/ See, e.g., Izzarelli v. Rexene Products Co., 24 F.3d 1506, 1524 (5th Cir. 1994) ("[I]n general, an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, . . . , provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan."); Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454, 457 (6th Cir. 1984) ("[A]n employer is free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated.").

whether the plan document, as amended, violates any substantive provision of ERISA.[29]

This is true even in Johnson v. Georgia-Pacific Corporation, 19 F.3d 1184 (7th Cir. 1994) -- a case which Petitioners showcase in their argument. (Pet. Brief 17-18, 22). In Johnson, the plan sponsor's Board of Directors adopted a plan amendment in November, 1989 which provided that, in the event of a change in control of the corporation, benefits to current employees would be increased so as to exhaust the surplus assets and those increased benefits would be deemed vested immediately. Corporate control did change and, in March, 1990, the terms of the plan, as amended, provided increased and fully vested benefits to current employees.

After observing that "when amending the plan in November, 1989 the defendants did not act as fiduciaries under ERISA," the Seventh Circuit considered whether the "implementation of the amendment in March, 1990" violated § 406 of ERISA, finding no violation because no asset was exchanged for another or otherwise disposed of as a result of the amendment. Id., at 1189. Finally, the court of appeals addressed and rejected the retirees' argument that the terms of the plan as amended violated their rights under ERISA by denying them enhanced benefits which were provided to current employees. Unlike in this case, therefore, the corporate officials who amended the plan in Johnson received no benefit for themselves or the plan sponsor in exchange for the enhanced benefits which went to employees in March, 1990, and the amendment itself did not violate any provision of ERISA. Thus, Johnson provides implicit support for Spink's position by recognizing both that an amended plan must comply with ERISA's terms in order to pass muster and that plan amendments which cause a plan to engage in a prohibited transaction violate ERISA.[30]

29/ E.g. Averhart v. U.S. West Management Pension Plan, 46 F.3d 1480, 1488 (10th Cir. 1994).

30/ Other cases cited by Petitioners or their amici are simply not on point either because they deal with the creation and funding of a new plan, rather than the use of existing funds held in trust, e.g., Akers v. Palmer, 71 F.3d 226, 230-231 (6th Cir. 1995), or they concern eligibility criteria for

Petitioners attack the Ninth Circuit's holding as a "powerful deterrent to creating new pension plans and new benefits within existing plans, since it would subject the plan's benefit eligibility criteria to a stringent fiduciary review rather than simply permitting the plan sponsor to determine these conditions." (Pet. Brief 6). But the Ninth Circuit did not invalidate (nor did Spink challenge) any of the benign "eligibility criteria" connected with the Plan's early retirement program. (JA 49-50). Because the provision conditioning the receipt of benefits on executing a waiver of all claims against Lockheed directs the plan to engage in a prohibited transaction, it is utterly disingenuous to characterize it as a benign eligibility criterion. The kinds of eligibility criteria which have been upheld by the courts are provisions, like the requirement of current employment status in Johnson, which themselves do not violate any substantive provision of ERISA.[31]

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welfare plans which do not hold funds in trust, see cases cited in footnote 22, supra, pp. 15-16.

31/ E.g., Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment which provided enhanced retirement benefits to employees in certain divisions, while denying them to others); Belade v. ITT Corp., 909 F.2d 736 (2d Cir. 1990) (attacking newly created retirement plan offering benefits only to certain full-time employees in designated departments); Averhart v. US West Management Pension Plan, 46 F.3d at 1488 (challenge to providing benefits to employees eligible for Directors' Retirement Program but not to other employees); Izzarelli v. Rexene Products Co., 24 F.3d at 1523 (challenge to amended plan amounted to argument that new terms benefitted some participants at the expense of others); Moore v. Reynolds Metals Co. Retirement P., 740 F.2d 454, 455 (6th Cir. 1984) (challenge to requirement that employees complete 5-month waiting period in order to receive benefits).

2. As a Named Fiduciary Under the Plan, Lockheed Had Discretionary Authority and Responsibility Regarding Plan Administration.

Under § 3(21)(A)(iii), a person is a fiduciary by virtue of the mere fact that he "has discretionary authority or discretionary responsibility in the administration of the plan." 29 U.S.C. § 1002(21)(A)(iii). "The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents." Varity Corp. v. Howe, slip op. at 12.

The Plan document confers on Lockheed several duties or powers in its role as a named fiduciary including, inter alia, amending the Plan, qualification of the Plan under applicable law, and designating the members of the Plan Committee. (JA 46). Lockheed's conduct in (1) amending the Plan document, (2) in a manner which renders it in violation of "applicable law" and (3) directing its own designees on the Plan Committee to implement the illegal amendment implicates the company's discretionary responsibilities with regard to all 3 assigned duties.

What is more, Lockheed assumed additional duties of plan administration through the enactment of the amendment, thereby inserting itself into the traditional role of a plan administrator. The amendment provides that the participant's employer is to prescribe and collect the forms for electing the voluntary retirement program, file the names of participating members with the Plan Committee, and even draft the Settlement Agreement and General Release it desires. (JA 50). Through its amendment, Lockheed not only directed the administration of an illegal provision but intervened to control the process of its implementation. For all these reasons, Lockheed's authority and responsibilities as a named fiduciary under the plan render it a fiduciary under § 3(21)(A).

III. IN ENACTING OBRA, CONGRESS PROHIBITED USE OF AN ACCRUAL FORMULA WHICH EXCLUDES PRE-ENACTMENT YEARS OF SERVICE WHEN AN EMPLOYEE WAS BARRED FROM PARTICIPATION BECAUSE OF AGE.

In 1967, Congress passed the ADEA "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." 29 U.S.C. §§ 621, 623(a)(1). ERISA too includes a ban on excluding employees from pension plan participation because of age. ERISA § 202, 29 U.S.C. § 1052. Prior to 1986, ERISA's general prohibition had a very narrow exception[32] which permitted defined benefit plans to exclude from plan participation any person who began working for the employer after reaching an age within five years of the plan's normal retirement age.

Pursuant to this exception, the Plan set a normal retirement age of 65, and excluded Spink and other employees who began working for Lockheed on or after their 60th birthday. (JA 58; CR 7 p. 256). Although not permitted by any statutory language, some employee benefit plans, including Lockheed's, also cut off benefit accrual or otherwise

32/ In the context of remedial social legislation like the ADEA and ERISA, exceptions to coverage are to be narrowly construed so as to ensure that the overall remedial purposes are not undermined. Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983) (ERISA); EEOC v. State of Maine, 644 F.Supp. 223, 226 (D.Me. 1986) (ADEA).

reduced older workers' benefits based on their age.[33] (CR 7, pp. 270-1).

In 1986 Congress enacted Subtitle C, entitled "Older Americans Pension Benefits," as part of OBRA 1986, to advance the "overall objective" of "assur[ing] that employee benefits plans do not discriminate on the basis of age." Conference Report, H.R.Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024 ("Conf. Rep."). To achieve this purpose, OBRA 1986 amended ERISA, the ADEA, and relevant portions of the Internal Revenue Code ("IRC") to prohibit retirement plans from excluding employees from participation because of age and to bar them from terminating or reducing the rate of benefit accrual because of an employee's age.

Under the Plan, as amended in response to OBRA, Spink became a participant on December 25, 1988, the first day of the plan year beginning in 1988. (JA 42). When he retired 1 1/2 years later on June 30, 1990, the Plan calculated his benefits using a benefit accrual formula which disregarded his pre-OBRA years of service because of his age at time of hire. Spink contends that, in doing so, Petitioners violated OBRA's prohibitions on reducing the rate of an employee's benefit accrual because of age. The question is not whether Congress sought to impose "retroactive participation" under OBRA 1986, but whether it wanted to prevent benefit accrual calculations from being decreased

33/ Contrary to Petitioners' assertion (Pet. Brief 32), the majority of courts examining the issue have held that the pre-OBRA practice of ceasing benefit accrual based on age violated the ADEA. E.g. AARP. V. Farmers Group. Inc., 943 F. 2d 996 (9th Cir. 1991), cert. denied, 502 U.S. 1059 (1992), Puckett v. United Air Lines, Inc., 705 F. Supp. 422 (N.D. Ill. 1989); Johnson v. Mayor and City Council of Baltimore, 637 F. Supp. 903 (D. Md. 1986), aff'd, 829 F. 2d 35 (4th Cir. 1987); EEOC v. Minneapolis Police Relief Ass'n, 645 F. Supp. 367 (D. Minn. 1986). This controversy began when DOL issued an Interpretative Bulletin stating it was permissible to cease benefit accrual for older workers. AARP v. EEOC, 655 F. Supp. 228, 232 and n. 9 (D.D.C.), rev'd in part, 823 F. 2d 600 (D.C. Cir. 1987). When it took over regulatory authority, the EEOC took a contrary view and voted twice to rescind the bulletin for conflicting with the ADEA. The EEOC Chairman also testified before Congress that the bulletin was inconsistent with the ADEA. The bulletin was rescinded in 1987 pursuant to court order, prior to the effective date of OBRA. Id.

because of any age-based considerations. The Ninth Circuit correctly held that it did.

A. The Plain Language of OBRA 1986's Benefit Calculation Provisions Bars Any Kind of Reduction In The Rate Of Benefit Accrual Because of Age.

Petitioners contend that the Ninth Circuit's ruling conflicts with this Court's decision in Landgraf v. USI Film Products, 114 S.Ct. 1483, arguing there is "no clear congressional intent" favoring a retroactive application of §§ 9201 and 9202. (JA 10). Under Landgraf's 3-part analytical model, however, the first question is "whether Congress has expressly prescribed the statute's proper reach." Id. at 1505. If so, the court should apply the statute as Congress intended, whether or not that application would be retroactive. Id. The language of OBRA 1986's benefit accrual provisions and their effective date clause shows Congress' intent to prohibit plans from reducing benefit accrual because of age, whether by excluding years of service because of age or through any other means.

The first section of OBRA 1986[34] announces Congress's purpose in its title, "Prohibition Against Discrimination on the Basis of Age in Employee Pension Benefit Plans." Pub. L. No. 99-509, § 9201, 100 Stat. 1973 (1986). Section 9201 amended the ADEA to make it "unlawful for an employer . . . to establish or maintain an employee pension benefit plan which requires or permits in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age". 29 U.S.C. § 623(i)(1)(A). Section 9202 made the same modifications to ERISA and the IRC. 29 U.S.C. § 1054(b)(1)(H)(i).

34/ OBRA's Subtitle C has four sections: § 9201 amends the ADEA to bar discrimination in benefit accrual; § 9202 enacts parallel provisions in ERISA and the IRC; § 9203 amends ERISA and the IRC to repeal provisions permitting exclusion of certain older workers and to authorize the use of a delayed normal retirement age for workers hired within 5 years of normal retirement age under the Plan; and § 9204 sets the effective dates for the other sections. 100 Stat. 1973-1980.

There is no question that these provisions are fully applicable to any employee who, like Spink, worked 1 hour during the 1988 plan year or thereafter. The provisions themselves bar age discrimination in calculating "an employee's benefit accrual." Entitled "Applicability to Employees With Service After 1988," § 9204(a) of OBRA 1986 sets forth the relevant effective date:

> (1) IN GENERAL. -- The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

100 Stat. 1979 (emphasis added). As the statutory language makes plain, the new provisions barring age discrimination in benefit accrual were intended by Congress to apply broadly to all employees with service after 1988.

The Ninth Circuit held that "the most natural reading" of OBRA 1986's prohibitions on reducing "the rate of an employee's benefit accrual" because of age "compels us to conclude that pre-enactment service years must be included in benefit accrual calculation." (JA 81-82). Recognizing that the benefit accrual formula under Lockheed's plan included Credited Service as a key factor and that "Spink's credited service was calculated as lower than that of a younger employee's because he was denied credit for all years of his employment," the Ninth Circuit found that this age-based reduction came within the "essence of OBRA's express prohibitions" and implied that allowing a rate reduction to be accomplished indirectly by discounting the number of credited service years, rather than directly by reducing one of the numerical factors or "rates" in a benefit accrual formula, would eviscerate the force of the OBRA 1986 prohibition. (Id. 83).

The conclusion that any age-based manipulation of the benefit accrual formula will violate OBRA's benefit accrual provisions is borne out by an examination of the subsections which follow the clause barring "the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i)(1). For example, subparagraph (2) clarifies

that "a limitation on the amount of benefits a plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan" will be permitted so long as they are imposed "without regard to age." Similarly, subparagraph (6) provides that a plan will not violate the statute because "the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals." Both provisions make explicit reference to "determining benefit accrual" under the plan which is done through applying the benefit formula. Even more significantly, both provisions implicitly condemn the age-based reduction here: subparagraph (2) recognizes that limitations on the years of service or participation considered "[with] regard to age" are prohibited; and subparagraph (6) suggests that disregarding certain portions of relevant factors, not just decreasing in a percentage "rate" for years of participation, will violate the statute. Further, as the Ninth Circuit noted, when Congress enumerates exceptions such as those in subparagraphs (2) and (6), it is reasonable to conclude that no other exceptions apply. (JA 84 and citations therein).[35]

Had Congress wanted to limit benefit accrual under § 204(b)(1)(H)(i) only to years after January 1, 1988 or to years in which an employee was a plan participant prior to

35/ When it passed OBRA 1986, Congress was aware of a number of different ways in which the benefit accrual formula could be manipulated to discriminate against older workers because of their age. DOL's Interpretive Bulletin described a variety of them, including the cessation of employer contributions, failing to credit service after normal retirement age, being exempt from doing actuarial adjustment for older workers, cutting off benefit accrual, delaying benefits to actual retirement date rather than as of normal retirement age, disregarding salary increases obtained after normal retirement age, and preventing older workers from obtaining benefit improvements which would be available to other plan participants. 29 C.F.R. § 860.120(f)(iv)(3), set forth in AARP v. EEOC, 655 F.Supp. at 233 n. 10. Given its knowledge of the bulletin and the controversy surrounding it, it is clear that Congress used broad language barring reduction of the rate of benefit accrual to encompass all these discriminations and any other possible ones and that Congress did not intend to preserve any of these discriminatory methods of benefit calculation, since none of them are identified as permissible in any provision of OBRA.

OBRA 1986, it could easily have done so by borrowing from existing language in § 204 of ERISA. But, unlike the language it used in § 204(h), which dictates notice requirements in connection with certain plan amendments, Congress did not restrict the prohibition on age-based benefit calculations to those resulting in a "reduction in the rate of future benefit accrual."[36] Similarly, Congress could have borrowed language from § 204(b)(1)(D) which states that certain provisions "shall not apply with respect to years of participation before the plan year to which this section applies," or with a slight modification "shall only apply to years of participation" before that plan year. In light of these readily available options, Congress's decision to use different language must be regarded as significant.

The Ninth Circuit's construction of OBRA 1986 is consistent with judicial interpretations of § 204(h), which provides that a defined benefit plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual," unless plan participants and beneficiaries receive notice in compliance with the statute. 29 U.S.C. § 1054(h) (emphasis added). Although few decisions have interpreted this provision, the Seventh Circuit construed the "rate of future benefit accrual" language in the same expansive manner that the Ninth Circuit read OBRA 1986's similar language. Davidson v. Canteen Corp., 957 F2d 1404 (7th Cir. 1992).[37]

36/ Nor did Congress rely on the statutory definition of "years of participation" in § 204(b)(4)(A) to define the nature and scope of its prohibition against discriminatory benefit accrual. 29 U.S.C. §1054(b)(4)(A).

37/ The benefit formula in Davidson included a "compensation" factor which the company altered by amending it to exclude income from stock options. Rejecting the company's argument that there was no "reduction in the rate of future benefit accrual" because it "did not adjust the percentage of compensation that would figure in a participant's pension payments," the Court ruled that "ERISA cannot allow a 'clarification' . . . of 'compensation' to achieve the same result as a reduced rate of accrual without the same effects," noting that the distinction is meaningless since both ensure that future benefit accrual will be reduced. Id. at 1407. Accord DiCioccio v. Duquesne Light Company, 911 F.Supp. 880 (W.D. Pa. 1995).

The Ninth Circuit's conclusion that "rate of benefit accrual" means the formula used to calculate an employee's accrued benefit is also consistent with other provisions in ERISA. While the statute does not provide a definition for "rate of benefit accrual," under § 3(23)(A) of ERISA, "[t]he term 'accrued benefit' means . . . in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A).[38] It follows, therefore, that the "rate of benefit accrual" is the formula by which the accrued benefit is determined, and that a manipulation of any factor or definition in the formula can effectuate a reduction in the rate of benefit accrual.

Petitioners read the benefit accrual provisions narrowly to mean that there may be no reductions in the "rate" at which an employee collects *years of participation*. Nothing in the language of OBRA 1986 suggests such a restrictive reading. Instead Petitioners' argument rests on the false premise that "ERISA requires pension benefit accruals to be based upon years of participation."[39] (Pet.

38/ See also ERISA § 204(b)(1)(A)-(D) (minimum standards for benefit accrual are also set forth as detailed formulas which establish the minimum level of "the accrued benefit to which each participant is entitled upon his separation from the service").

39/ Contrary to Lockheed's contention, ERISA permits benefit calculation formulas which do not rely on either years of service or participation. E.g., Labor Reg. § 2540.204-3 (identifying permissible formulas, including under (b)(1), a formula based on a percentage of compensation, without regard to years of service). In enacting OBRA, moreover, Congress explicitly recognized that benefit computations may be based on factors other than years of participation. E.g. Conf. Rep. at 4023 (plan does not violate benefit accrual rule "merely because the plan limits benefits to a stated dollar amount or a stated percentage of compensation"); § 4 of ADEA, 29 U.S.C. § 623(i)(2). Further, Petitioners' reliance on § 204(b)(1)(C) of ERISA for its faulty proposition is misplaced, since this is merely one of the clauses which sets minimum benefit accrual standards which all covered plans must satisfy. 29 U.S.C. § 1054(b)(1)(A)-(C). While a plan's benefit accrual formula must result in retirement benefits which meet these minimum standards, it does not have to use years of participation as a factor in calculating benefits. Labor Reg. § 2540.204-3. Further, even if a plan's benefit accrual provisions conform to these standards, they still must also comply with the discrimination bar in § 1054(b)(1)(H)(i).

Brief 34). The "rate" of benefit accrual is a much broader notion, however. The formula used to determine benefit accrual may involve numerous factors, including the type of employment engaged in, the number of years of service, the amount of an employee's salary or wage, and definitions of the type or level of income to be considered in benefit calculations.[40] Taken together all these factors in the formula constitute the "rate of benefit accrual," and it is this rate which may not be reduced because of age.

Petitioners attack the Ninth Circuit's interpretation as one which "confuses the concepts of (1) the 'rate of an employee's benefit accrual' . . . with (2) the total benefit accrued" and attempt to clear up the perceived confusion by reference to the allegedly incremental nature of benefit accrual and its rate over time. (Pet. Brief 35-37 and n. 20). But it is the Petitioners who are confused. Under a non-contributory defined benefit pension plan, such as the Plan here, a participant does not "accrue" benefits in the sense of collecting or amassing them in an account which is maintained on his or her behalf. Instead, at the time a Plan participant retires, the Plan uses a "formula" to calculate the participant's "accrued benefit" often by reference to various factors such as the employee's years of service or the amount of compensation received. While certain facts such as an employee's years of service or his salary in certain years may become fixed, neither the significance of those antecedent

40/ While certain restrictions must be observed, "the potential number of benefit formulas is almost limitless." M. Canan, Qualified Retirement and Other Employee Benefit Plans, vol. 1, § 3.52, p. 159 (West Publishing 1995). But two primary types are used: (1) the "fixed benefit" formula, under which benefits constitute a certain percentage of recognized compensation or a flat, fixed sum without any consideration as to the number of years of service; and (2) the "unit benefit" formula, under which benefits constitute a certain percentage of compensation or a flat dollar amount for each year of service with the employer. 1 Mamorsky, Employee Benefits Law, § 3.03[5], p. 3-20.13 (Law Journal Seminars Press 1992).

facts nor the actual benefits which will flow from them can be determined until the date an employee retires.[41]

Petitioners also take issue with the Ninth Circuit's focus on what impact the Plan's age-based criteria would have on Spink's actual pension benefits in order to determine whether there was an improper "reduction in the rate of benefit accrual." (JA 36). But as a purely practical matter this is precisely what a court must do to determine the real effect of a change in the benefit accrual formula.[42] For all

41/ The flaw in Petitioners' argument is revealed by using their own hypothetical plan formula. (Pet. Brief 36-37, n. 20). Assume that a plan has a benefit accrual formula which provides a benefit equal to 1.5% of final compensation times the employee's years of service. Because the employee's compensation level during his early years will not be considered in the final formula, any calculation of either the benefits accrued during these years or the "rate" at which such benefits were accrued would be illusory. A key factor in the "rate of benefit accrual" will not be known until the time of retirement. For example, assuming 100% vesting at the end of 1 year, an employee who earns $30,000 in his first year and retires at its conclusion obtains an "accrued benefit" of $450. If the employee retires 4 years later at a salary of $50,000, he has an accrued benefit of $3,750, or $750 for each year of service. If his final compensation after 5 years is only $20,000, his accrued benefit is only $1,500, or $300 for each year of service. Thus, the value of the benefits "earned" in any service year cannot be accurately measured at the end of that year, but rather at the time of retirement through the application of the benefit accrual formula.

42/ Koenig v. Intercontinental Life Corp., 880 F.Supp. 372, 375 (E.D.Pa. 1995) (because examination of the formulas alone did not reveal whether there was a significant reduction in the "rate of future benefit accrual," under § 204(h), court compared the projected benefit calculations for the two formulas to determine that a significate rate reduction had occurred); DiCioccio v. Duquesne Light Company, 911 F.Supp. 880. Another example of why it is often necessary to run actual benefit calculations to determine the impact of a change in formula can be drawn from the Plan itself. Beginning in plan year 1989, the Plan's benefit formula changed in several respects, including by increasing the money figure in the formula from $2.00 to $16.25, disregarding $119.23 per week which was once included in the formula's salary factor, imposing a new 35-year cap on the previous formula structure, and importing a new factor (the Average Weekly Rate) and a new formula for calculating benefits based on any years of service after the first 35 up to a total of 40 years. (CR 7, 1990 Plan, §§ 1.02, 1.10, 1.12, 6.01(A), pp. 14-15, 19-20, 21, 43-44). In light of the complex and varying nature of the formula changes, the best way to determine whether the Plan increased or decreased "the rate of benefit accrual" is to compare the benefits forthcoming under each formula.

these reasons, the Ninth Circuit properly found that the language of OBRA's benefit accrual provisions barred any discriminatory reduction in a benefit accrual formula, including one which decreases an employee's benefits by excluding certain service years from being considered Credited Service under the plan.

Petitioners' contrary argument rests, not on the benefit accrual provisions of OBRA 1986, but on the participation provisions in §§ 9203(a) and 9204(b). Section 9203(a) repeals prior provisions allowing plans to exclude older employees from plan participation based on their age. Subsection (b) of § 9203 ameliorates the impact of this repeal by allowing pension plans to delay or extend the "normal retirement age" for employees who begin work with an employer within 5 years of the established normal retirement age, until "the 5th anniversary of the time the plan participant commences participation in the plan." Section 9204(b), entitled "Applicability of Amendments Relating to Normal Retirement Age," provides that the § 9203(a) bar on discriminatory participation standards and the companion provision allowing a delayed "normal retirement age" apply "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after that date."

Although it is clear from OBRA's language that these provisions deal only with plan participation and computing a delayed normal retirement age, Petitioners seek to superimpose them onto the benefit accrual provisions to deny full benefits to Spink and the putative class. But nothing in OBRA 1986 directs or even permits such a result. Section 9203(a) refers only to the repeal of provisions which allowed plans to exclude older workers from *participation*; it says nothing of *benefit accrual*.

Petitioners argue, nonetheless, that the § 9204(b) language applying the participation amendments to "service performed" on or after January 1, 1988, will have no meaning unless construed to limit the application of the benefit accrual provisions. But § 9204(b) employs language focussing on "service performed" after 1987 to define what

time frames should be counted for figuring out the delayed "normal retirement age" for workers who started work with an employer at an advanced age. The provision expressly provides that, in implementing the new participation provisions, a plan may decide to calculate the delayed normal retirement age under Section 9203(b) solely by reference to "service performed" on or after January 1, 1988. Petitioners' strained attempt to apply § 9204(b) to read it differently is simply not warranted by any statutory language and "would require [this Court] to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's" application. Landgraf, 114 S.Ct. at 1495.

Far from assisting Petitioners, a structural analysis of OBRA 1986 strengthens Spink's position.[43] OBRA 1986 simultaneously effects two changes in pension law in order to eradicate age discrimination. If Congress had wanted to restrict the application of OBRA's benefit accrual provisions to years of service after 1987, there would have been no reason to have two effective date provisions. A single provision would have sufficed for all OBRA amendments. Instead, Congress enacted two separate clauses with different language and consciously opted not to limit the applicability of the benefit accrual provisions either to years of service or

43/ Petitioners contend that the Ninth Circuit's comparison of subsections (a) and (b) of § 9204 conflicts with this Court's supposed holding in Landgraf that "'negative inferences' made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute clear legislative intent of retroactivity." (Pet. Brief 39). Landgraf simply does not stand for such a proposition. The court in Landgraf ruled that, in light of explicit retroactivity language in a prior version of the Civil Rights Act which was mentioned as a reason for the prior bill's veto, specific prospectivity language in two relatively minor provisions in a bill with more than 50 sections did not necessarily imbue a nondescript provision requiring that the Act be "effective upon enactment" with retroactive meaning. Id., 114 S.Ct. at 1493-94. By contrast, the Ninth Circuit compared the only two effective date clauses, sitting side-by-side in a 4-section bill, and reached a conclusion compatible with the substantive provision at issue and Congress' rejection of a previous version which would have limited the "retroactive" application of that provision.

participation on or after January 1, 1988 or any other date.[44] There is no "logical reason why Congress would not include a limitation in the immediately preceding subsection [§ 9204(a)], which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting" those standards. (JA 86).

What is more, Petitioners' argument about § 9204(b) flies in the face of expressed public policy. Assuming, arguendo, that § 9204(b) applies at all to the benefit accrual provisions, any ambiguity about its application must be construed in favor of providing full benefits to all employees regardless of age so as to effectuate the remedial purposes of ERISA, the ADEA and OBRA 1986.[45] This is particularly true here where Petitioners seek to use a strained and ambiguous relationship between two separate statutory provisions to sanction age discrimination in benefit accrual as part of an enactment passed with the "overall objective . . . to assure that employee benefit plans do not discriminate on the basis of age." Conf. Rep. at 4024.[46]

44/ Petitioners argue that the language differences in the two subsections derive from a congressional desire to "leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) in the then-ongoing litigation." (Pet. Brief 40). Since the ongoing litigation addressed the manner in which benefits were to be calculated for participants who retired *before* OBRA's effective date, Congress left open the question merely by making OBRA applicable only in plan years after 1987 and only as to persons retiring in those plan years, so the debate about pre-OBRA benefit accrual does nothing to explain the difference between § 9204(a) and (b).

45/ See S.Rep. No. 93-127 (1973), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 4854 ("It is intended that coverage under [ERISA] be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs."); Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984) (ERISA); Rettig v. Pension Ben Guar. Corp., 744 F.2d 133, 155 n. 54 (D.C. Cir. 1984) (ERISA); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), aff'd, 434 U.S. 99 (1977) (ADEA).

46/ Assuming, arguendo, that Petitioners' argument were accepted by the Court, Lockheed's plan still violates the ADEA and ERISA. OBRA 1986 unequivocally states that its bar on excluding older workers from plan participation "shall apply only with respect to plan years beginning on or

B. Legislative History Demonstrates That Excluding Pre-enactment Service Years Based on Age Constitutes A Discriminatory Benefit Calculation.

As in Landgraf, 114 S.Ct. at 1493-94, the Ninth Circuit also probed the legislative history and determined that it "verifie[d] [the court's] reading of the language of the OBRA 1986 amendments." (JA 84). The Ninth Circuit looked at the relevant effective date clause, § 9204(a)(1), and its relation to an earlier version of this clause which would have expressly limited OBRA 1986's prohibition on age-based benefit calculations to certain "accrual computation periods."[47] (JA 85). The Ninth Circuit found that, because it jettisoned the limiting language in favor of a clause making the prohibition broadly applicable to all employees in plan years after 1987, Congress plainly intended no limit on the years of service to be included in benefit calculations under OBRA's provisions. (JA 86).

A second aspect of the legislative history supports Spink's interpretation. The final version of OBRA 1986 departed from the original Senate amendment by excising its provision sanctioning continued age discrimination based on the employee's age at the date of hire. According to the Conference Report, the Senate amendment on non-discriminatory benefit accrual provided:

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after January 1, 1988, and only with respect to service performed on or after such date." See Conf. Rep, at 4019, 4027. Spink worked a full year of Credited Service from January 1 through December 24, 1988, but was only credited with years of participation worked after December 25, 1988. Thus, even if Lockheed's limiting reading of OBRA 1986 were correct, the plan still failed to comply with the law, because it shorted Spink and similarly-situated participants of one year of participation under the Plan's benefit formula.

47/ The Senate amendment demonstrates the alternative which was ultimately rejected by Congress: "Under the Senate amendment, the provision is effective with respect to employees who are employed after December 31, 1988, with respect to accrual computation periods beginning after December 31, 1986. In the case of employees not employed after December 31, 1988, the provision applies to accrual computation periods beginning after December 31, 1988." Conf. Rep. at 4022.

> A defined benefit pension plan is not treated as failing to satisfy the benefit accrual requirements merely because the plan (1) excludes an employee from plan participation if the employee is hired within five years before normal retirement age under the plan, or (2) imposes a limit on the benefits that the plan provides or on the number of years of service or plan participation taken into account in calculating an employee's benefit under the plan.

Conf. Rep. at 4022. Rather that including an exception for those who were previously excluded because of age, the final version of the bill makes no mention of the first exception, retaining only the second exception. 29 U.S.C. § 1054(b)(1)(H)(ii). By cutting out this reference entirely, Congress made plain its intent to eliminate all vestiges of the prior age discrimination allowed under federal pension law and to permit no exceptions based on prior age-based exclusions from participation.[48]

C. Relevant IRS Pronouncements Are Consistent With The Ninth Circuit's Interpretation Of OBRA 1986, But Not Entitled To The Deference Accorded Final Substantive Regulations.

Spink contends that the ultimate position of the IRS supports his position, not that of Petitioners. Then EEOC Chairman Clarence Thomas issued proposed regulations on November 27, 1987, which provided, in general, that years of service before 1988 may be disregarded because of age in determining a participant's benefits. 52 Fed. Reg. 45,360 (1987). On April 11, 1988, the IRS published proposed regulations setting forth the general rule that pre-enactment years of service must be included in benefit calculations but carving out an exception for persons, like Spink, who were previously excluded from participation because of age. Prop.

48/ Nor can it be argued that Congress would not have adopted Spink's argument because of the supposedly crippling impact this would have on pension plans. (See AARP Brief 29-30).

Treas. Regs. § 1.411(b)-2, 53 Fed. Reg. 11,877 (1988). On December 9, 1988, the IRS announced its intent to issue final regulations which "will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988)." IRS Notice 88-126, 1988-2 C.B. 538 (1988). An EEOC notice concurred in the IRS position that "the final regulations . . . will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988)." 54 Fed.Reg. 604 (1989). Neither notice indicates any intent to carve out an exception to this rule for participants who were once lawfully excluded from participation because of their age.[49]

The Court should avoid any reliance on the exception carved out in the IRS proposed regulations. First, while deference may be due the IRS on matters on which it has substantive expertise and authority, interpreting when and how a new statute goes into effect is uniquely within the province of the courts, not the IRS. Second, no federal agency has issued final regulations implementing OBRA 1986. Courts routinely disregard proposed regulations as unpersuasive, because the agency has not completed formal rule-making and may revise the rules it has proposed.[50] Finally, an administrative interpretation excluding previous years of service, merely because of the age of the employee at the time of hire, conflicts with the plain language and clear Congressional intent of OBRA 1986 and, thus, should not be granted any deference. Chevron USA v. Natural Resources

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49/ The IRS notice explicitly provides that, while "[t]axpayers may rely on this notice . . . [n]o inference should be drawn, . . . , regarding any issue not specifically addressed in this notice." Id. The directive to include all years of service in any benefit calculation is "specifically addressed" in the notice, but Petitioners' proposed exception is not.

50/ E.g. Matter of Appletree Markets, Inc., 19 F.3d 969, 973 (5th Cir. 1994) (no deference to proposed regulations); Bolton v. Commissioner of Internal Revenue, 694 F.2d 556, 560-1 n. 10 (9th Cir. 1982) ("the Commissioner nevertheless concedes that a proposed regulation still is not entitled to the deference due a final regulation."); Oakley v. City of Longmont, 890 F.2d 1128, 1133 (10th Cir. 1989) (Prop. Treasury Regs.); Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1036 n.10 (4th Cir. 1980).

Defense Counsel, 467 U.S. 837, 104 S.Ct. 2778, 2782 n. 9 (1984). Sections III-A, et seq.

D. Because Spink's Construction of OBRA Has No Retroactive Effect, the Presumption Against Retroactivity Does Not Apply.

Even if the Court were to conclude that Congress did not "expressly prescribe[ ] the statute's proper reach," no presumption against retroactivity may be invoked unless the statutory construction urged by Spink would have a retroactive effect. Landgraf v. USI Film Products, 114 S.Ct. at 1505. While Lockheed blithely asserts Spink's position requires a retroactive application, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." Id., at 1498.

On the one hand, a statute which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Id. at 1499, quoting Justice Story's opinion in Society for Propagation of the Gospel v. Wheeler, 22 F.Cas. 756, 767 (No. 12,156) (CCDNH 1814). On the other hand, however, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation," Cox v. Hart, 260 U.S. 427, 435, 43 S.Ct. 154, 157 (1922), or because it "upsets expectations based in prior law." Landgraf, 144 S.Ct. at 1499. "[N]o person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit," and a change in law affecting the consequences flowing from past conduct is not considered retroactive. Chicago & Alton Railroad Company v. Tranbarger, 238 U.S. 67, 73, 76 (1915).

The question here is whether a statute enacted in 1986 requiring that all past years of service be included in benefit calculations for older employees who retire in or after 1988 impairs "vested rights" or imposes new obligations based on events "already past," making it retroactive, or whether it merely "upsets expectations based in prior law" by relying on antecedent facts for its prospective application. Because it

impairs no vested rights and imposes no new duties based on completed past events, OBRA 1986 is plainly not retroactive.

Spink's construction neither penalizes past conduct nor impairs vested rights, recognizing as it does that the new benefit accrual provisions of OBRA first became effective in plan years beginning on or after January 1, 1988. Although enacted on October 21, 1986, OBRA's amended provisions did not become operative in *any* plan until more than 13 months later and then only in pension plans with plan years starting on or about January 1, 1988. For many plans, including Lockheed's, OBRA's provisions were not effective for more than 2 years after enactment. Spink has never argued that the benefit accrual provisions or any other aspect of OBRA were operative either prospectively during the 1986 and 1987 plan years immediately following enactment or retroactively during any plan year before OBRA's enactment in 1986. His construction results in no penalties for plans which did not comply in pre-1988 years and no recalculation of benefits paid in those years.

Lockheed can identify no "vested right" it had on October 20, 1986, which it lost as a result of the enactment of OBRA the next day. It is true that, under the law as it existed at the time and in the absence of an intervening change in the law, Lockheed could expect that it would owe no pension benefits to older workers like Spink because of their years of service prior to the 1986 enactment. While it may be that Lockheed converted its understanding of then current law into expectations about the future administration of its pension plan, Lockheed had no *vested right* to expect that future federal regulation would leave undisturbed the nature or extent of its obligations to its older workers in subsequent plan years.[51]

In essence, Lockheed argues that since Congress allowed the Plan to characterize Spink's pre-1988 employment as falling outside the rubric of Credited Service for calculating benefits before OBRA's enactment, any attempt by Congress to alter that characterization in the

51/ It had no vested right in the "general rule of law or policy of legislation" that certain years of service could be disregarded in calculating future benefits because of the employee's age at time of hire. Chicago & Alton Railroad, at 76.

future would take away its vested rights. But in enacting a new statute, Congress may "choose to classify or reclassify a thing, and provided the new definition is applied only to determine status for the purpose of matters arising in the future, the prohibition on retroactive laws is not violated." U.S. E.P.A. v. New Orleans Public Service, Inc., 826 F.2d 361, 363 (5th Cir. 1987)("A law is not made retroactive because it alters the existing classification of a thing"); Campos v. INS, 16 F.3d 118 (6th Cir. 1994)(same). Further, requiring a new formula to compute the level of future benefits, payments or reimbursements is not retroactive, even if the formula makes reference to pre-enactment facts and characterizes those facts in a manner which sharply diverges from prior law.[52]

The same is true here. Spink's interpretation of OBRA requires that any determination of accrued benefits made in or after plan year 1988 be done according to the new statute's mandates so as to ensure that age-based considerations will not reduce a retiring employee's pension benefits. Interpreting OBRA to prohibit a plan from excluding pre-enactment years of service because of the employee's age at the time of hire simply does not result in a retroactive application of the statute.[53]

Just as it cannot assert impairment of vested rights, Lockheed cannot contend that OBRA, as construed by Spink, "attaches new legal consequences to events *completed* before

52/ Admin. of Tulane Educational Fund v. Shalala, 987 F.2d 790 (D.C. Cir. 1993)(upholding as purely prospective federal regulations using new formula to compute Medicare reimbursements after 1984, even though regulations permitted government to use new figures for base year 1984 factor in formula and thus ignore the actual reimbursement amount for 1984 which the hospital had established as reasonable through administrative and/or judicial appeals); Asso. of Accredited Cosmetology v. Alexander, 979 F.2d 859, 863 (D.C.Cir. 1992)(no retroactivity where government deemed school ineligible for participation in federal student loan programs based on its students' default rates in previous years, even though those same rates had been permissible under prior law).

53/ Puckett v. United Air Lines, Inc., 705 F.Supp. at ("An employee's benefit amount is calculated with the formula existing at the time of the employee's retirement, not with a formula that existed at the beginning of or during the accrual period," so pre-enactment service years should be included when applying OBRA 1986 after 1987).

its enactment." Landgraf, 114 S.Ct. at 1499 (emphasis added). Supreme Court precedent establishes that a new statute is not retroactive unless all conduct which triggers its operation occurs before the date of enactment; so long as the relevant course of events is completed after enactment, the statute will be deemed to apply prospectively. Reynolds v. United States, 292 U.S. 443, 54 S.Ct. 800 (1934) (although veteran not entitled to subsidized medical care for years prior to enactment of 1924 statute barring pension deductions for such care, prospective application of the statute prohibited any post-enactment deductions, whether the charges arose prior to or after the date of enactment).[54]

One way to pose the retroactivity question, therefore, is to ask whether a statute alters the legal consequences of a closed transaction, a completed course of conduct, or a terminated relationship.[55] The event or act which closes or

54/ See also United States v. Security Indus. Bank, 459 U.S. 70, 78-79, 103 S.Ct. 407, 412-413 (1982) (holding that using the Bankruptcy Reform Act to invalidate liens perfected prior to its passage would be a retroactive application of the Act); Greene v. United States, 376 U.S. 149, 84 S.Ct. 615 (1964) (holding that employee's entitlement to lost wages under 1955 directive "matured" when he obtained favorable "final determination" reversing his security clearance termination in 1959, so the application of a 1960 regulation issued while his claim was pending would be retroactive); McAndrews v. Fleet Bank of Massachusetts, N.A., 989 F.2d 13, 16 (1st Cir. 1993) (1989 federal statute permitting the Federal Deposit Insurance Corporation, as receiver, to enforce contracts entered into by failed banks, even where the contract contemplated its termination upon insolvency, not considered improperly retroactive because key events triggering the statute's application -- including the bank's insolvency and invocation of the termination clause -- occurred after the date of enactment).

55/ See Claridge Apartments Co. v. Commissioner of Internal Revenue, 323 U.S. 141, 164, 65 S.Ct. 172 (1944) ("It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed."); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882 (1976) ("To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . ."); New York Cent. & Hudson River R.R. Co. v. U.S. (No. 2), 212 U.S. 500, 505-06, 29 S.Ct. 309, 311 (1908) (holding that a statute prohibiting rebates could validly be applied to a rebate paid after the act's effective date with respect to property transported before the act's effective date.).

completes the relevant transaction or relationship has been described by Justices Scalia and Thomas as the "determinative event by which retroactivity or prospectivity is to be calculated." Republic National Bank of Miami v. U.S., 113 S.Ct. 554, 565 (1992) (Thomas, J., concurring); Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 857 n. 3, 110 S.Ct. 1570, 1588 n. 3 (1990) (Scalia, J., concurring). Under the First Circuit's formulation, the "determinative event" is the incident which finally "triggers the statute's application." McAndrews, at 16.

Under Spink's interpretation, OBRA has no impact on his right to non-discriminatory benefit calculation until the beginning of the 1988 plan year. Had Lockheed decided to terminate its Plan during plan year 1986 or 1987, the Plan would have had no obligation to pay Spink or any similarly-situated employee any pension benefits. Nor does Spink contend that OBRA requires the payment of new or different benefits to any employee who retired before plan year 1988. Older workers who retired from Lockheed before December 25, 1988 are simply not entitled to OBRA's protections. Thus, OBRA's application is triggered only where a pension plan operates after plan year 1987, and only with respect to persons who retire after that year. Since both Lockheed's decision to maintain a pension plan in plan year 1988 onward and the post-December 24, 1988 employment of Spink and the putative class occurred well after OBRA's 1986 enactment date, its application here is plainly not retroactive.

What is more, a statute which applies to any employee with "1 hour of service in any plan year to which such amendments apply" is clearly intended to include all employees who retire during those plan years. OBRA, § 9204(a)(1) (emphasis added). The statute explicitly targets an employee's retirement date as the "determinative event" for purposes of its application. It is the participant's employment relationship with the company which must be "completed" or "already past" for a truly retroactive application to occur.

Because the interpretation of OBRA urged by Spink only applies to persons employed by Lockheed more than 2 years after the statute's enactment, it cannot be considered retroactive. As with any law which operates prospectively, Petitioners had the "opportunity to know what the law

[would be] and to conform their conduct accordingly," Landgraf, 114 S.Ct. at 1497, and Petitioners took advantage of this opportunity by amending the Plan to impose the delayed normal retirement age permitted by OBRA. (CR 7 at p. 23). Since Spink's construction operates prospectively, the presumption against retroactivity does not apply. Instead any statutory ambiguity must be resolved so as to advance the remedial purposes of ERISA, the ADEA and OBRA.

E. Even If the Court Were to Deem Spink's OBRA Construction To Be Retroactive, Congress' Intent To Apply It In That Manner Arises From OBRA's Clear Language Read In the Context of ERISA's History.

The presumption against retroactivity is rebutted by "clear congressional intent favoring" the retroactive application which is being urged. Landgraf, 114 S.Ct. at 1505. There is substantial evidence supporting Spink's interpretation of OBRA 1986 in its statutory language, structure, purpose and legislative history and the context in which the new OBRA 1986 provisions are placed in ERISA and the ADEA. Sections III-A & B, supra.

Read in the historical context of ERISA enactments from 1974 to the present, this evidence shows that Congress intended that pension plans be barred from excluding any prior years of service because of age. As AARP has shown in its *amicus* brief in Section III-B, when Congress uses language identifying the first plan year in the future to which a pension amendment will apply or identifying the employees whom the amendment will benefit, as it did in OBRA 1986, the statute is usually intended to be applied so as to include all years of an employee's service. On the other hand, if it intends a more limited application, Congress generally makes that limitation explicit in the statute.

Recognizing the substantial impact that pension regulation can have on an ongoing pension plan, Congress delayed the effective date of many ERISA provisions to allow plans time to conform without endangering their financial stability. Congress also avoided retroactive applications of new provisions so plans would not have to resettle claims of participants who separated from service with the employer

before the effective date of a pertinent ERISA provision.[56] As of the effective date, however, the new ERISA protection comes into full force and effect. Thus, for example, while Congress provided that the full applicability of ERISA's vesting provisions and the plan termination program under ERISA's Title IV should be delayed until several years after enactment, these provisions were fully operative on their effective date with respect to all years of an employee's prior service.[57]

Viewed in light of this history, Congress' intent in passing OBRA 1986's benefit accrual provisions is apparent. While delaying the applicability of the provision until 2 years after enactment to allow plans to adjust to the new requirements and to prevent their application to persons retiring before the effective date, Congress deliberately chose language it has generally used to require that an ERISA provision be fully applicable to all years of service on the enactment date and declined to use any language limiting the relevant service years. Even under the stricter third prong of the Landgraf model, therefore, Spink's interpretation must be accepted.

CONCLUSION

For all the reasons above, Spink requests that this Court affirm the Ninth Circuit's decision with regard to all matters raised by the Questions Presented, remand for further proceedings consistent with the Court's ruling, and grant him attorneys' fees and costs.

56/ Smith v. CMTA-IAM Pension Trust, 654 F.2d 650, 657 n. 7 (9th Cir. 1981); Fremont v. McGraw-Edison Company, 606 F.2d 752, 758 (7th Cir. 1979), cert. denied 445 U.S. 951 (1979).

57/ Nachman Corp. v. Pension Benefits Guaranty Corp., 446 U.S. 359, 382-4 (1980) ("Had petitioner waited another day to terminate, Title I's vesting standards would have become effective, thereby increasing the number of employees whose benefits would have become vested.")

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(17)

No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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27pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

I. WHETHER "IMPLEMENTATION" OF A LAWFUL PLAN AMENDMENT CONSTITUTES A BREACH OF FIDUCIARY DUTY IS FAIRLY INCLUDED WITHIN THE SCOPE OF THE ISSUES PRESENTED . . 1

II. AMENDING A PLAN TO INCREASE PENSION BENEFITS IS NOT FIDUCIARY CONDUCT, AND THE PLAN'S FIDUCIARIES BREACH NO DUTY BY FOLLOWING THE NON-DISCRETIONARY TERMS OF THAT AMENDMENT 3

A. Amending A Plan To Increase Benefits Is Not A Fiduciary Function and Does Not Give Rise To A Prohibited Transaction 4

B. Section 406 Does Not Regulate Benefit Payments Or Eligibility Criteria For Newly Created Benefits 9

C. The Plan Fiduciaries Did Not Engage In A Prohibited Transaction Or Otherwise Breach A Fiduciary Duty By Paying Benefits In Accordance With The Non-Discretionary Terms Of The Plan Amendment 14

III. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG AND INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases | Page(s)

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 6

Amato v. Western Union Int'l, Inc.,
773 F.2d 1402 (2d Cir. 1985),
cert. dismissed, 474 U.S. 1113 (1986) 8

Arizona Governing Comm. v. Norris,
463 U.S. 1073 (1983) 20

Commissioner v. Keystone Consolidated Industries, Inc.,
508 U.S. 152, 113 S. Ct. 2006 (1993) 11

Curtiss-Wright Corp. v. Schoonejongen,
__ U.S. __, 115 S. Ct. 1223,
131 L. Ed. 2d 94 (1995) 4, 5, 8, 16

Delgrosso v. Spang & Co.,
769 F.2d 928 (3d Cir. 1985),
cert. denied, 476 U.S. 1140 (1986) 9

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d Cir.),
cert. denied, 116 S.Ct. 306 (1995) 16

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 9

Hickerson v. Velsicol Chemical Corp.,
778 F.2d 365 (7th Cir. 1985),
cert. denied, 479 U.S. 815 (1986) 8

Johnson v. Georgia-Pacific Corp.,
19 F.3d 1184 (7th Cir. 1994) 11

Landgraf v. USI Film Products,
___ U.S. ___, 114 S. Ct. 1483,
128 L. Ed. 2d 229 (1994) 1, 17

Los Angeles Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978) 20

Meredith v. Navistar Int'l Transp. Corp.,
935 F.2d 124 (7th Cir. 1991) 12

Nachman Corp. v. Pension Benefit Guaranty Corp.,
446 U.S. 359 (1980) 10

Newton v. Rumery,
480 U.S. 386 (1987) 13

Rogers v. General Electric Co.,
781 F.2d 452 (5th Cir. 1986) 13

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 5

Stroman v. West Coast Grocery Co.,
884 F.2d 458 (9th Cir. 1989),
cert. denied, 498 U.S. 854 (1990) 13

Varity Corp. v. Howe,
__ U.S. __, __ S. Ct. __,
134 L. Ed. 2d 130 (1996) 5, 15

Statutes

Age Discrimination in Employment Act

29 U.S.C. § 623(i)(1) 17
29 U.S.C. § 626(f)(1) 13

California Labor Code

§ 5001 . . . . 13, 14

Employee Retirement Income Security Act

29 U.S.C. § 1002(14) 11
29 U.S.C. § 1002(21)(A) 8
29 U.S.C. § 1002(25) 6
29 U.S.C. § 1002(29) 6
29 U.S.C. § 1002(30) 6
29 U.S.C. § 1023(b)(2) 6
29 U.S.C. § 1054(b)(1)(H)(i) 17
29 U.S.C. § 1054(g)(1) 8
29 U.S.C. § 1101 5
29 U.S.C. § 1104(a)(1) 8
29 U.S.C. § 1104(a)(1)(A) 5
29 U.S.C. § 1104(a)(1)(B) 5
29 U.S.C. § 1104(a)(1)(D) 5, 7, 9, 13, 15
29 U.S.C. § 1106(a) 11
29 U.S.C. § 1106(a)(1)(B) 8
29 U.S.C. § 1106(a)(1)(D) 6

Omnibus Budget Reconciliation Act of 1986

§ 9203(a) 19
§ 9204(b) 18

Other Statutes

18 U.S.C. § 1954 14
29 U.S.C. § 186 14

Administrative Interpretations

29 C.F.R. § 2509.75-8, D-2 15
IRS Notice 88-126, 1988-2 C.B. 538 (1988) 18, 19
Treas. Reg. § 1.401(A)(4) - 4(b)(2)(ii)(B) 13

REPLY BRIEF FOR PETITIONERS

Respondent argues that the Ninth Circuit's decision should be affirmed on both issues presented in this case. On the first issue -- whether Lockheed violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, by amending the terms of its pension Plan to create a new benefit -- respondent contends that a plan sponsor's decision to amend its plan is fiduciary conduct, despite abundant case law to the contrary. There is no statutory basis for holding either that a plan sponsor violates ERISA § 406 when amending its plan to increase benefits, or that the plan administrator breaches a fiduciary duty when paying the benefits mandated by following the non-discretionary terms of that amendment.

On the second issue -- whether the new pension benefit accrual rules adopted by the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986") apply retroactively -- respondent contends that the Ninth Circuit correctly applied *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), in finding that the statute applies retroactively. This is based upon an interpretation of statutory language which unnecessarily strains the bounds of the English language, and also requires the Court to overlook the contrary administrative interpretation of the same statutory language by the Internal Revenue Service ("IRS"), the agency which concededly has authority for enforcing this provision of OBRA 1986.

I. WHETHER "IMPLEMENTATION" OF A LAWFUL PLAN AMENDMENT CONSTITUTES A BREACH OF FIDUCIARY DUTY IS FAIRLY INCLUDED WITHIN THE SCOPE OF THE ISSUES PRESENTED.

Respondent and his *amici* initially argue that the Court should limit its inquiry to the question of whether Lockheed

breached a fiduciary duty by amending the Plan to create a new pension benefit conditioned upon a waiver of employment claims, and refuse to decide the subsidiary issue of whether the Plan's fiduciaries (*i.e.*, the members of the Retirement Committee who were named as defendants in the Complaint and who are also petitioners in this Court) could somehow breach a fiduciary duty by "implementing" the non-discretionary terms of the amended Plan even if the amendment is lawful. Respondent's Brief at 5-6. Respondent's argument should be rejected, because he has consistently taken the position both in this Court and in the courts below that there is no meaningful distinction between the lawfulness of amending the Plan and administering the Plan as amended.

The district court expressly held that there was no distinction between amending the Plan and administering the terms of the lawfully amended Plan.[1] Respondent did not challenge this holding on appeal and the court of appeals did not question the district court's reasoning on this point. J.A. at 87-91. Respondent similarly failed to draw any distinction between plan amendment and implementation of a lawful plan amendment at the petition stage in this Court, apparently accepting petitioners' argument that there was no meaningful difference between the two concepts. Petition at 12 n. 5; Petitioner's Reply Brief at 5 n. 4. The argument that "implementation" of a lawful plan amendment could constitute a fiduciary breach was first raised by the United States, and even now respondent argues that it would be a "false

[1] The district court held that "[t]he Court views the subsequent payment of enhanced benefits to selected participants as merely [Lockheed's] adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, [respondent] *fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions.*" J.A. at 69 (emphasis added).

distinction" to differentiate between the lawfulness of amending the Plan on the one hand and implementing the terms of the amended Plan on the other. Respondent's Brief at 7.

Petitioners agree that there is no meaningful distinction between the lawfulness of amending the Plan as opposed to implementing the non-discretionary terms of the amended Plan, *i.e.*, paying benefits to eligible participants. If the first is lawful, so is the second. Other than the United States, the other parties and their *amici* agree with this concept, and instead focus their argument on whether the Plan amendment violated ERISA § 406 by creating new pension benefits for participants who voluntarily choose to receive them subject to certain eligibility criteria, including execution of a release of employment-related claims. Whether framed as a separate issue or incorporated within the question of whether Lockheed violated § 406, the issue of whether "implementation" of the non-discretionary terms of Lockheed's lawfully amended Plan may result in a breach of fiduciary duty is subsidiary to, and fairly included within, the scope of the questions presented in the Petition.

II. AMENDING A PLAN TO INCREASE PENSION BENEFITS IS NOT FIDUCIARY CONDUCT, AND THE PLAN'S FIDUCIARIES BREACH NO DUTY BY FOLLOWING THE NON-DISCRETIONARY TERMS OF THAT AMENDMENT.

Two significant points are apparent from respondent's arguments. First, neither he nor his *amici* defend a central element of the Ninth Circuit's decision: that a violation of ERISA § 406 can occur in the absence of fiduciary conduct. J.A. at 88 n.5. Instead, respondent seems to recognize that § 406 regulates fiduciary conduct, and cannot be violated unless a fiduciary breaches a fiduciary duty.

Second, it is quite clear that the real issue which bothers respondent is not the fact that extra pension benefits were paid to employees who elected voluntary retirement, but that those employees were required to confirm the voluntary nature of their retirement by signing a release as a condition of receiving extra pension benefits. In other words, respondent seeks the benefit of the Plan amendment without the burden of its eligibility criteria. Respondent and his *amici*, such as the National Employment Lawyers Association ("NELA"), would prefer a rule that permits employees to "voluntarily" retire, receive extra pension benefits, and then sue their ex-employer for constructive discharge, violation of the ADEA, or a myriad of other employment-related claims. Although this may seem ideal to the plaintiffs' employment bar, it is not a scenario envisioned by employers who offer early retirement programs. There is nothing in ERISA which prohibits an employer such as Lockheed from taking steps, when creating new and additional benefits to which employees are not otherwise entitled, to ensure that this does not happen, regardless of whether the issue is viewed as one of plan design and amendment or non-discretionary plan implementation.

A. Amending A Plan To Increase Benefits Is Not A Fiduciary Function and Does Not Give Rise To A Prohibited Transaction.

Respondent does not dispute that the eligibility conditions for the new benefit created by Lockheed fully satisfy ERISA's minimum participation, funding, and vesting requirements. He also acknowledges that this Court recognized in *Curtiss-Wright Corp. v. Schoonejongen*, __ U.S. __, 115 S. Ct. 1223, 1228, 131 L. Ed. 2d 94 (1995), that a welfare plan sponsor acts in a settlor, rather than fiduciary, capacity when amending an ERISA plan. Although not acknowledged by respondent, the same principle was recognized by both the majority and the dissenting opinions in

Varity Corp. v. Howe, __ U.S. __, __ S.Ct. __, 134 L. Ed. 2d 130 (1996), slip op. at 8, 15; dissent at 16.

Respondent attempts to reconcile his argument with *Curtiss-Wright* and *Varity* by suggesting that the plan sponsor's decision to amend a *pension* plan should be considered a fiduciary act, even though amending a *welfare* plan is not. Respondent's Brief at 15. This distinction finds no support in ERISA. The fiduciary standards of ERISA (including the prohibited transaction rules in § 406) apply with equal force to both pension and welfare plans. *See* 29 U.S.C. § 1101; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Although it is true that § 406 may have no relevance to an unfunded welfare plan since an unfunded plan has no assets, and without any assets there can be no transaction, respondent overlooks the fact that not all welfare plans are unfunded. Respondent's Brief at 15 n.22. Funded welfare plans do exist; for example, most multi-employer plans that provide welfare benefits are funded, and the prohibited transaction rules in § 406 apply to such plans with the same force as they do to a pension plan. Moreover, other fiduciary rules exist which apply to all plans, funded or unfunded, pension or welfare. *E.g.*, 29 U.S.C. §§ 1104(a)(1)(A), (B), (D). In short, it makes no sense to accept respondent's invitation to create a different set of fiduciary standards for pension and welfare plans when the same statutory provisions apply to both. The United States agrees with Lockheed on this point, stating that "[a] plan sponsor does not act as a fiduciary when it creates, amends, or terminates a pension plan." Brief for the United States at 9.

Respondent nonetheless argues that Lockheed acted as a fiduciary when it amended the Plan because the act of amendment "exercised actual control over the disposition of plan *assets*." Respondent's Brief at 17 (emphasis added). This argument ignores the text of ERISA. The Plan amendment only changed Lockheed's

promise to its employees and thus increased the Plan's *liabilities* to pay increased benefits to retiring employees. There was absolutely no change in the form, content or amount of the Plan's assets or the way they are invested. ERISA expressly recognizes that plan assets are different than plan liabilities. *E.g.*, 29 U.S.C. § 1023(b)(2) (annual report must include "a statement of assets and liabilities . . ."); 29 U.S.C. §§ 1002(25), (29), (30) (defining different types of "liabilities"). Respondent ignores this fundamental distinction between a plan's assets and its liabilities, and also ignores the fact that ERISA's fiduciary rules in general (and the prohibited transaction rule in particular) focus on the investment and disposition of plan assets. *E.g.*, 29 U.S.C. § 1106(a)(1)(D) (prohibiting the transfer to, or use by, a party in interest "of any *assets* of the plan") (emphasis added). Although respondent acknowledges that ERISA § 406 is intended "to safeguard the financial integrity of plans," Respondent's Brief at 8 n.10, he ignores the fact that the Plan amendment in this case did not in any way jeopardize the Plan's financial integrity: plan assets were used as intended to pay benefits to Plan participants.

The creation of a new plan benefit is a settlor function where the employer creates a new plan liability and thus does not act as a fiduciary.[2] So long as the employer satisfies the minimum funding, participation, and vesting standards of ERISA it is free to establish the terms and conditions of the new benefit promise. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("the private parties, not the Government, control the level of benefits . . . "). Indeed, respondent seems to recognize that

[2] There is a good reason for this rule. The employer must fund the plan, and if for any reason the plan is not fully funded the employer must make up the difference even when the shortfall results from stock market setbacks, pensioners living longer lives than expected, or other matters beyond the control of the employer.

Lockheed would be free to adopt a *new* pension plan or funded welfare plan with the same eligibility criteria as the 1990 Plan amendment, Respondent's Brief at 21 n.30, even though there is no logical distinction between adopting a new plan and amending an existing one in these circumstances.

Respondent's argument to the contrary uses flawed reasoning: he argues that plan amendment must be a fiduciary function because the plan fiduciaries must comply with ERISA when administering the plan.[3] Respondent's Brief at 17-19. The latter proposition may well be an accurate description of discretionary plan administration, *see* 29 U.S.C. § 1104(a)(1)(D), but it does nothing to prove that plan amendment itself is a fiduciary function. What respondent overlooks is that because amending a plan to create a new pension benefit is not a fiduciary act, it cannot be declared "illegal" as a prohibited transaction under § 406 or any other part of ERISA which regulates fiduciary conduct.[4]

[3] Both respondent and *amici* argue at some length that Lockheed is trying to "trump" ERISA by amending its Plan, but this is simply not true. Lockheed has not contended that, and this case does not present the issue of, whether a fiduciary is insulated from liability when following an illegal plan directive. Brief for Petitioners at 19 n.11. Instead, the legality of an amendment which creates new pension benefits subject to specified eligibility criteria must be determined from other parts of ERISA, most notably the participation and vesting requirements codified at 29 U.S.C. § 1051-61, and the funding requirements codified at 29 U.S.C. § 1081-86. Lockheed complied with all of these substantive requirements, a point which neither respondent nor his *amici* disputes.

[4] Respondent apparently concedes that § 406 does in fact regulate fiduciary conduct, since he makes no attempt to defend the Ninth Circuit's contrary holding that a § 406 violation can occur in the absence of a fiduciary breach. J.A. at 88 n.5. The United States similarly agrees with Lockheed on this point, stating that "the court of appeals erred in holding . . . that Lockheed violated Section 406(a)(1)(D) of ERISA when it adopted the 1990 Plan amendments." Brief for the United States at 11.

Respondent also argues that even if Lockheed did not fall within the statutory definition of a "fiduciary" when amending the Plan, it should nonetheless be deemed a fiduciary due to the language of the Plan.[5] Respondent's Brief at 23. Fiduciary status, however, depends upon whether the actor's conduct falls within the scope of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), not whether that conduct is labelled "fiduciary" or "non-fiduciary" by the plan document. In any event, the Plan unambiguously and expressly states that "[t]he *Corporation* reserves the right to amend . . . the Plan by action of the Board of Directors," J.A. at 48, thus confirming that the right to amend is reserved as a settlor rather than fiduciary function. *Curtiss-Wright*, 115 S. Ct. at 1227-28.

None of the cases cited by respondent change this conclusion. *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986), confirms that ERISA permits an employer to both amend and terminate a pension plan. *Id.* at 374-75. The court went on to hold that an ERISA violation may have occurred because the interest rate which accrued on undistributed plan assets was limited to the artificially low rate of 5% per annum, *id.* at 377-78, but this resulted either from a reduction in accrued benefits, *see* 29 U.S.C. § 1054(g)(1), or violation of the "prudent man" standard for investing plan assets. 29 U.S.C. § 1104(a)(1). *Hickerson* does not place any restrictions of a fiduciary nature on the plan sponsor's right to amend the plan, especially when the amendment *creates* a new benefit.

Amato v. Western Union Int'l Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), similarly provides

[5] Respondent previously abandoned his claims for benefits under the terms of the Plan, J.A. at 63 n.1, so it is surprising that he would now base his remaining claim upon Plan language.

no support to respondent. *Amato* does recognize that a cause of action could be stated if the fiduciaries conspired with the plan sponsor to deprive participants of "pension benefits to which they are entitled," 773 F.2d at 1417, but the court went on to hold that this would occur only if the fiduciaries (1) diverted funds from the plan or (2) misled the participants through fraudulent misrepresentations. Neither claim is presented here: Lockheed's Plan has always satisfied the applicable funding requirements, and Lockheed truthfully and accurately described the conditions for the voluntary retirement program to its employees.[6]

B. Section 406 Does Not Regulate Benefit Payments Or Eligibility Criteria For Newly Created Benefits.

Respondent argues that Lockheed's amendment to the Plan violated ERISA § 406(a)(1)(D) because one of the eligibility criteria for the newly created pension benefit was that the participant release Lockheed from any employment-related claims as a condition of receiving new benefits. Respondent's Brief at 8. In making this argument, respondent contends that pension benefits payments made to participants, in accordance with the terms of the plan documents, are covered by the prohibited transaction rule. The United States makes a similar argument, albeit in connection

[6] *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), is inapposite because it involved a collectively-bargained plan where the employer had no contractual right to amend the plan during the term of the agreement. *Id.* at 935-36. Not surprisingly, the employer's attempt to amend the plan in violation of the union contract was held to violate any number of statutes, including ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)(D). In this case, by contrast, the Plan expressly reserves to Lockheed the unilateral right to amend. J.A. at 48-49. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978) is similarly distinguishable, because there the plan trustee used plan assets to purchase stock in the corporation which employed him, thus giving him the power to appoint other corporate officers, increase his own salary, and control the company until it collapsed due to his own mismanagement.

with its discussion of "implementation" of the Plan's terms rather than the Plan amendment itself. Brief for the United States at 15-16. Regardless of whether analyzed as plan amendment or implementation, the argument should be rejected because benefit payments are not included among the transactions prohibited by ERISA § 406, and that is why § 406 does not prohibit Lockheed from adopting the Plan amendment or bar the Plan fiduciaries from following the terms of the amended Plan.

The text of ERISA § 406 makes no reference to benefit payments. The United States nonetheless suggests that § 406(a)(1)(D) could be read (if given the most expansive construction permitted by the English language) to bring pension benefit payments required by the terms of the Plan within the scope of the prohibited transaction rule. Brief for the United States at 15. This presents an awkward and ultimately false problem, because the parties and their *amici* all agree that the "primary purpose of ERISA, after all, was to encourage and safeguard the payment of pension benefits." *Id.* at 16. *See also Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980) (purpose of ERISA is to ensure "that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it"). To interpret § 406(a)(1)(D) in this manner would lead to absurd results, a point which no party disputes.

The best way to avoid this absurd result is to recognize that § 406(a)(1)(D) does not restrict benefit payments made by a plan to participants and beneficiaries.[7] The text of ERISA strongly

[7] The United States suggests another approach, contending that pension payments to former employees would fall outside the scope of § 406 because former employees do not fall within the definition of a "party in interest." 29

(continued...)

supports this conclusion. Section 406(a) expressly prohibits a plan from engaging in *other* types of specific transactions with the plan sponsor, including sales, leasing, loans, the furnishing of goods or services, the transfer of assets, or the acquisition of securities in or real property of the employer. 29 U.S.C. § 1106(a). Each of these transactions addresses the management and disposition of plan assets. Congress' underlying concern was that by these transactions the assets of the plan are put at risk and may not then be available for their intended purpose -- paying benefits. Benefit payments, by contrast, fall on the "liability" side of the plan's balance sheet, and are governed by entirely separate provisions of ERISA which do not include § 406.[8] In short, there is nothing in the text of the statute which suggests that § 406 regulates the eligibility criteria for benefit payments.

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152, 113 S. Ct. 2006 (1993), similarly rebuts any argument that § 406 regulates benefit payments, since in that case the Court emphasized that Congress created a bright-line test when it enacted ERISA § 406. "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." 113 S. Ct. at 2012. It would contradict *Keystone* to now read § 406 as authorizing an *ad hoc* approach under which some benefit

[7] (...continued)
U.S.C. § 1002(14). This fails to take into account the fact that funded welfare plans pay benefits to current employees, who are parties in interest. 29 U.S.C. § 1002(14)(H). Adopting the United States' argument would effectively make it illegal for funded welfare plans to pay benefits, which is directly contrary to both the text and intent of ERISA and the very purpose of welfare plans.

[8] *See Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994) ("[29 U.S.C.] [s]ection 1002(21)(A)(i), in conjunction with §§ 1104 and 1106, requires trustees and other persons to deal with the assets of the plan in circumspect and prudent ways. It has nothing at all to say about the debit column of the balance sheet . . . "). *See also supra* at 6.

payments would be permitted and others prohibited depending upon the fiduciary's subjective evaluation of the eligibility criteria for such benefits. *Keystone* confirms that § 406 does not regulate benefit payments of any type, but was instead intended to prohibit other precisely specified uses of plan assets by the fiduciaries.

The mischief a standardless *ad hoc* approach will create is amply demonstrated by the varying and inconsistent rules of decision proffered by respondent, his *amici*, and the United States. NELA Brief at 7-8 (criticizing Solicitor General's test as "lax and unpredictable"). For example, respondent concedes that employers should continue to enjoy various "incidental benefits" of plan amendments which increase pension payments, such as (1) avoiding current cash outlays in the form of wages, (2) buying industrial peace by settling strikes and (3) reducing the risk of litigation by employees. Respondent's Brief at 11. But there is no meaningful difference between these "incidental benefits" and the benefit derived from eligibility criteria which includes a release of employment-related claims. If an employer may permissibly amend its pension plan to "reduc[e] the likelihood of lawsuits by former employees who receive early retirement benefits," *id.*, there is no reason not to eliminate altogether that risk by also requiring a release. *Cf. Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 126 (7th Cir. 1991) ("Not wanting to let Navistar's good deed go unpunished, Meredith sued Navistar under ERISA. Meredith claimed that Navistar . . . forc[ed] him into early retirement").[9]

The United States proposes a different, yet equally unworkable rule. The United States does not object to a release

[9] NELA, by contrast, proposes a more draconian standard that would either outlaw these "incidental benefits," or at the very least make them subject to litigation. NELA Brief at 8-9. NELA would presumably prohibit an employer from increasing pension benefits to settle a strike or strike-related unfair labor practices, or to condition an enhanced benefit upon a covenant not to compete.

per se, instead conceding that the plan sponsor could reasonably (and lawfully) condition the payment of enhanced pension benefits upon "a waiver of ADEA or other claims arising out of the early retirement itself . . ." Brief for the United States at 21. But once the United States acknowledges that a release of employment termination claims is permitted, it offers no principled explanation as to why § 406 should be read to prohibit a broader or different release.[10] This is because ERISA was not enacted for the purpose of regulating the content of releases -- instead, that subject is governed by state law and other federal statutes.[11]

[10] Existing Treasury Regulations contradict the United States' argument on this point, since they contemplate that a release may encompass all claims which an employee has against the employer, not just those claims arising out of the employee's decision to retire. *E.g.*, Treas. Reg. § 1.401(A)(4) - 4(b)(2)(ii)(B) (payment of benefits conditioned upon, *inter alia*, "execution of a waiver of rights under the Age Discrimination in Employment Act or other federal or state law . . ."). Moreover, respondent raised no issue below as to the scope of the release in this case. J.A. at 91 n.6.

[11] *See, e.g.*, 29 U.S.C. § 626(f)(1) (ADEA claims may not be waived "unless the waiver is knowing and voluntary"); Cal. Lab. Code § 5001 ("No release of liability or compromise agreement [of workers' compensation claims] is valid unless it is approved by the [California Workers' Compensation] appeals board or referee"). Lockheed's release would not, therefore, waive liability for "toxic torts" or "work-related injuries" due to California Labor Code § 5001. With respect to claims for "race or sex discrimination," the courts of appeals have uniformly held that "'public policy favors voluntary settlement of employment discrimination claims brought under Title VII.'" *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 460-61 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990), *quoting Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986). *Cf. Newton v. Rumery*, 480 U.S. 386 (1987) (release of malicious prosecution claims in return for dismissal of criminal charges is not barred by public policy). Thus, it may be that a particular form of release will not be given legal effect or might only be partially effective under ever changing state and federal substantive law when challenged in collateral proceedings, but questions as to the enforceability of a release in particularized circumstances does not mean ERISA is violated nor does it require plan fiduciaries to play the role of state or federal judges rendering advisory opinions on whether all aspects of a release will be enforced. For example, even if Lockheed as plan sponsor desired the release it prepared in its

(continued...)

There is no need to fear the parade of horribles which respondent and his *amici* suggest if Lockheed's argument on this point is accepted. Contrary to NELA's suggestion, § 406 would continue to prohibit various transactions between plans and plan sponsors, including loans, sales, or leases. Moreover, there is no merit to NELA's argument that Lockheed's interpretation of ERISA § 406 would make it permissible to condition pension benefits upon the delivery of "valuable consideration" to fiduciaries, corporate executives, or union officials. NELA Brief at 7. There are other statutes which regulate this area, such as the anti-kickback provisions of 18 U.S.C. § 1954, and the Taft-Hartley Act, 29 U.S.C. § 186. NELA's hypothetical concern over improper payments can be resolved through these existing statutory prohibitions, not by judicially expanding ERISA § 406 to create a new category of prohibited transactions which is nowhere listed in the statute.

C. The Plan Fiduciaries Did Not Engage In A Prohibited Transaction Or Otherwise Breach A Fiduciary Duty By Paying Benefits In Accordance With The Non-Discretionary Terms Of The Plan Amendment.

The United States makes an additional argument -- which respondent apparently does not join -- that although Lockheed's Plan amendment was not fiduciary conduct under ERISA, the "implementation" of that lawfully adopted amendment might provide an independent basis for finding a breach of fiduciary duty. Brief for the United States at 11; *see also* Respondent's Brief at 7 (arguing that only a "false distinction" exists between plan

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11 (...continued)
sponsor capacity to release California employees' workers' compensation claims, it failed. Cal. Lab. Code § 5001.

amendment and implementation of the amended plan). The United States' argument should be rejected, because in this case the Plan administrator merely applied the non-discretionary eligibility criteria, mandated by the unambiguous terms of the Plan amendment, to determine which participants were entitled to enhanced pension benefits. "Implementation" of the lawful and non-discretionary terms of an ERISA plan cannot constitute a fiduciary breach. *See, e.g., Varity Corp.*, slip op. at 14 ("the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime") (emphasis in original); 29 C.F.R. § 2509.75-8, D-2 (a person does not become a fiduciary with respect to a plan by performing non-discretionary functions including, *inter alia*, "[a]pplication of rules determining eligibility for participation or benefits").

As discussed *supra*, the principal flaw to the United States' argument is that it would create an *ad hoc* approach based upon subjective judgments as to the wisdom of a particular plan's eligibility criteria rather than the statutory language of § 406 or any other portion of ERISA. The test proposed by the United States as to whether benefit payments to participants would breach a fiduciary duty relies upon vague concepts such as whether Lockheed received a benefit which employers "ordinarily" or "normally" receive from the existence of a pension plan. Brief for the United States at 17. No legal standard or line of decision is suggested which could guide plan sponsors, fiduciaries, or courts to make these *ad hoc* determinations. The fact that the United States disagrees with respondent and his other *amici* as to how this *ad hoc* standard should be applied demonstrates that this approach would only generate much confusion and endless litigation. *See* Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America at 16-22.

Moreover, the United States' interpretation of § 406(a)(1)(D) would put plan administrators at risk of breaching their fiduciary duty, since they would then be required to rely upon subjective judgment rather than the terms of the plan when determining eligibility for benefits. *Curtiss-Wright*, 115 S. Ct. at 1231 ("plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents . . . "). The resulting disincentive to sponsors to increase or create new benefits for participants is exactly the opposite of what ERISA sought to accomplish.

When Congress enacted ERISA it specifically decided *not* to regulate the sponsor's motivation for creating or amending a plan. There is no text in ERISA which defines the "ordinary" or "normal" eligibility criteria for plan participation. The only eligibility criteria established by ERISA are the minimum participation and vesting standards, which are fully and undeniably satisfied by Lockheed's Plan and which are not at all implicated by the creation of the new benefits voluntarily chosen by eligible Plan participants. Beyond that, employers are free to design pension plans to suit their own unique circumstances, a flexibility which no doubt encourages employers to create new pension plans and expand existing plans. If Congress wished to further regulate the scope of benefit eligibility criteria it could no doubt do so, but so far it has not. ERISA § 406 should not now be judicially rewritten to regulate the form and content of employee release agreements when this subject is not addressed in the statutory language.[12]

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[12] The United States also mentions the existence of an issue as to whether more consideration must be offered to employees who are older than age 40 to validly release ADEA claims. Brief for the United States at 22 n.15. *See generally DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir.) (release is valid where same consideration was offered to employees of all ages), *cert. denied*, 116 S.Ct. 306 (1995). This issue is not presented here because the respondent never signed a release.

III. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG AND INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986.

On the second issue presented by the case, respondent argues that Congress expressly provided for retroactive application of OBRA 1986 and that the "default" rule of *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), does not come into play. Despite making this assertion, respondent fails to identify any language in OBRA 1986 which expressly provides for retroactive application, a result which is not surprising because there is no such statutory language. Instead, respondent relies chiefly upon the Ninth Circuit's misreading of the statutory phrase which prohibits an age-based reduction of "the rate of an employee's benefit accrual," 29 U.S.C. § 623(i)(1); 29 U.S.C. § 1054(b)(1)(H)(i), by arguing that the word "rate" actually means "the formula used to calculate an employee's accrued benefit." Respondent's Brief at 30.[13] This is just another way of saying that the "rate" of benefit accrual means the "total" benefit accrued. To interpret the statute this way, however, would be to change entirely the meaning of its plain language. Lockheed fully

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[13] *Amici* for respondent attempt to support this position by pointing to language in OBRA 1986 permitting a plan to limit the number of years of participation or service taken into account for computing benefit accruals so long as the limitation is imposed without regard to age. AARP Brief at 19-20; NELA Brief at 21-27. This provision was added in order to ensure that the common practice of limiting the maximum number of years that could be taken into account for benefit accrual purposes (e.g., providing that only 30 years of service could be counted) would not be treated as a violation of the new benefit accrual rules. This provision, which concerns situations where years that would otherwise need to be counted for benefit accrual purposes may be ignored, has no relevance to the problem posed in this case–determining whether Congress intended that years before the effective date of OBRA 1986 need to be taken into account in the first place.

satisfied OBRA 1986 once it took effect because there has been no reduction in the rate of respondent's benefit accrual based on his age or any other factor once he became a participant. The Plan makes no such age based reduction and respondent conceded below that he has been paid benefits in accordance with the Plan.[14] The United States agrees with Lockheed that the court of appeals' interpretation reflects a "fundamental misunderstanding" of OBRA 1986, and that Lockheed complied in all respects with OBRA 1986 after it took effect. Brief for the United States at 27-28.

Respondent also errs by denying that the Ninth Circuit's decision conflicts with the IRS interpretation of OBRA 1986. Respondent's Brief at 37-38. Respondent concedes that the IRS's proposed regulation does not require that a plan retroactively credit an employee, such as respondent, for prior years of service if the employee was not a participant prior to the effective date of OBRA 1986. Respondent's Brief at 37. Respondent's further argument that a subsequent administrative interpretation -- IRS Notice 88-126 somehow changed this aspect of the proposed regulation is simply incorrect. The Notice expressly states that "the final regulations to be issued by the IRS . . . *will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under*

[14] In a footnote respondent argues that he was deprived of one year of participation because he was not given credit for his service from January 1, 1988 to December 24, 1988. This issue is not properly before the Court because respondent abandoned any claim for benefits under the terms of the Plan. J.A. at 63 n.1, 79. Moreover, respondent has clearly miscalculated when he was required to be made a participant under OBRA 1986. Lockheed's Plan Year starts on December 25. J.A. at 41, Plan § 1.20. OBRA 1986 required his participation for "plan years beginning on or after January 1, 1988, and only for service performed on or after such date," OBRA 1986 § 9204(b). Since the first Plan year under OBRA 1986 *started* December 25, 1988, respondent became a participant on that day and his January 1, 1988, to December 24, 1988 service properly was *not* counted.

noncontributory defined benefit plans." IRS Notice 88-126, 1988-2 C.B. 538 (1988) (emphasis added). Since respondent concedes that the Proposed Regulation is adverse to his position, it is not surprising that he fails to acknowledge this portion of the Notice. The next sentence of the Notice (which is partially quoted in Respondent's Brief at page 38) does nothing to change this analysis -- it only notes that years of service completed by a *participant* in years before 1988 must be counted. Respondent was not a participant before 1988, so this does not apply to him. The United States agrees with Lockheed that the "Secretary of the Treasury has consistently interpreted Section 9203(a) to have only prospective effect," and that it should be accorded "substantial deference" as an authoritative administrative interpretation that taxpayers have reasonably relied upon since 1988. Brief for the United States at 24-25.

Respondent also argues that forcing Lockheed to credit him for pre-1988 service would not constitute retroactive application of OBRA 1986. Respondent's Brief at 39. Specifically he seeks a determination that his accrued benefit increased from zero on December 24, 1988 to a fully vested benefit on December 25, 1988 that reflects his service with Lockheed from 1979 onward. Under respondent's theory, he would have been fully entitled to this benefit if he had retired December 25, 1988. Since this new benefit occurs entirely because new consequences are assigned to events that occurred before the effective date of OBRA 1986, it is obvious that respondent is arguing for retroactive application of the statute.

Moreover, respondent's argument ignores the economic fact that pension funds operate by setting aside money today to pay benefits in future years, so any change in the benefit accrual rules for past service necessarily constitutes retroactive application of a statute. "[T]he rules that apply to [pension] funds should not be

applied retroactively unless the legislature has plainly commanded that result." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978); *see also Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-07 (1983) (Opinion of Powell, J.). The reason for this rule is that "[r]etroactive liability could be devastating for a pension fund." *Manhart*, 435 U.S. at 722. Moreover, it is no answer for respondent to argue that Lockheed's Plan in particular could afford to pay the additional liability, since the Court's ruling will affect countless other pension plans with varying degrees of solvency and could result in an aggregate unexpected liability exceeding $1 billion. *Id.* at 722 n.42. Respondent's attempt to avoid the presumption against retroactive application of a new pension benefit accrual rule should therefore be rejected.

CONCLUSION

Petitioners urge the Court to reverse the decision of the Ninth Circuit, and remand the case with instructions to affirm the district court's dismissal of Counts I, II, and III of the complaint.

DATED: April 11, 1996.

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No. 95-809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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40 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Decision Below Improperly Applied ERISA's Fiduciary Standards To A Plan Sponsor's Design Of An Employee Benefit Plan. 4

A. ERISA's Fiduciary Duty Standards Govern The Conduct Of Plan Fiduciaries. 4

B. Lockheed Did Not Act As A Fiduciary When It Amended Its Pension Plan. 5

C. ERISA's Fiduciary Duty Provisions Were Designed To Protect Employee Benefit Plans From Abuses In The Management Of Plan Assets, Not To Regulate The Design Of Employee Benefit Plans. 12

II. The Decision Below Is Irreconcilably In Conflict With The Actions Of Congress, The Treasury Department, And The Courts That Uphold The Widespread Practice Of Offering Early Retirement Benefits In Exchange For A Release Or Other Resolution Of Claims Against An Employer. . . . 16

A. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread. 16

B. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases. 19

C. Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases. 21

D. Other Appellate Courts Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Retirement Benefits. 22

E. Settlements Of And Judgments In Age Discrimination Lawsuits, Including Suits Filed By The EEOC, Frequently Require An Employer To Amend Its Pension Plan To Provide Enhanced Benefits To Resolve The Claims Against The Employer. 23

III. Because The Advantages That Lockheed Derived From The Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, The Decision Below Is Inconsistent With The Lawfulness Of Many Other Widespread Employment Practices. . . 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases ***Page***

Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1995) . . . 5
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) . . . 2, 25
Amato v. Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) . . . 5
Astor v. International Business Machines Corp., 7 F.3d 533 (6th Cir. 1993) . . . 22
Bigger v. American Commercial Lines, Inc., 862 F.2d 1341 (8th Cir. 1988) . . . 10
Blistein v. St. John's College, No. 94-2223, 1996 WL 30672 (4th Cir. Jan. 26, 1996) . . . 22
Cirillo v. ARCO Chemical Co., 862 F.2d 448 (3d Cir. 1988) . . . 22
Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) . . . 17
Commissioner v. Keystone Consolidated Industrial, 113 S. Ct. 2006 (1993) . . . 14
Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995) . . . 2, 9, 13, 14
District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468 (S.D.N.Y. 1983) . . . 7
Dougherty v. Chrysler Motors Corp., 840 F.2d 2 (6th Cir. 1988) . . . 10
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) . . . 2, 13

Page

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 25
Foster Medical Corp. Employees' Pension Plan v. Healthco, Inc., 753 F.2d 194 (1st Cir. 1985) . . . 10
Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 2
Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987) 18
Hickerson v. Velsicol Chemical Corp., 778 F.2d 365 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) 10
Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 27
Holliday v. Xerox Corp., 732 F.2d 548 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984) 11
International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) 2
Johnson v. Georgia-Pacific Corp., 19 F.3d 1184 (7th Cir. 1994) 5
Kwatcher v. Massachusetts Service Emp. Pension Fund, 879 F.2d 957 (1st Cir. 1989) 14
Malia v. General Electric Co., 23 F.3d 828 (3d Cir.), *cert. denied*, 115 S. Ct. 377 (1994) 5
Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 14
Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993) 13
Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 2
Milwaukee Area Joint Apprenticeship Training Comm. v. Howell, 67 F.3d 1333 (7th Cir. 1995) 6, 14

Page

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 8, 9
New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671 (1995) 2
Patterson v. Shumate, 504 U.S. 753 (1992) 2
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 2
Sinai Hospital of Baltimore, Inc. v. National Benefit Fund, 697 F.2d 562 (4th Cir. 1982) 13
Siskind v. Sperry Retirement Program, 47 F.3d 498, 505 (2d Cir. 1995) 5
Spink v. Lockheed Corp., 60 F.3d 616 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 806 (1996) 4, 7
Trenton v, Scott Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) . . . 5, 27
United Steelworkers of America v. Cyclops Corp., 860 F.2d 189 (6th Cir. 1988) 11
White v. Distributors Association Warehousemen's *Pension Trust*, 751 F.2d 1068 (9th Cir. 1985) . . . 15

Statutes and Regulations

Age Discrimination in Employment Act ("ADEA")
29 U.S.C. §§ 621 *et seq.*, ... 20
29 U.S.C. § 623(f)(2) 20
29 U.S.C. § 623(*l*)(1) 20
29 U.S.C. § 623(*l*)(2) 27
29 U.S.C. § 626(f)(1) 20

Davis-Bacon Act
40 U.S.C. § 267a(b) 25

Page

Employee Retirement Income Security Act of 1974 ("ERISA")
29 U.S.C. § 1002(1) 7
29 U.S.C. § 1002(21)(A) 7
29 U.S.C. §§ 1052-56 15
29 U.S.C. § 1053(c)(1)(A) 15
29 U.S.C. § 1054(g) 15
29 U.S.C. § 1058 10
29 U.S.C. § 1101(a) 28
29 U.S.C. § 1102 15
29 U.S.C. § 1106 . . . . 1, 4
29 U.S.C. §§ 1106-08 22

Internal Revenue Code of 1986
Int. Rev. Code § 419A(c) 27
Int. Rev. Code § 501(c)(9) 27
Int. Rev. Code § 4975 22

The Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 ("OWBPA") 19, 20

29 C.F.R. § 5.31 (1995) 25
Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) 21
Treas. Reg. § 1.401(k)-1(a)(3)(iv) 26
Treas. Reg. § 1.411(a)-4(c) 21

Page

Legislative History

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Page

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-809

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The ERISA Industry Committee ("ERIC") submits this brief *amicus curiae* supporting Petitioners. This brief addresses solely the question whether Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims.

The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

INTEREST OF *AMICUS CURIAE*

ERIC is a non-profit organization representing over 120 major employers, virtually all of whom maintain defined benefit pension plans governed by ERISA and who therefore could be affected the Court's decision in this case. ERIC frequently participates as *amicus curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] ERIC previously joined in a brief *amici curiae* in support of Petitioners' Petition for Writ of Certiorari.

Because the Court's decision in this case is likely to determine the lawfulness of many popular early retirement programs, and to determine the enforceability of the many thousands of releases that have been executed in recent years by retiring employees in exchange for enhanced early retirement benefits under their employers' retirement plans, ERIC has a profound interest in the resolution of this case. ERIC's interest in this case also is based on the likelihood that the Court's decision will have a significant effect on the lawfulness of many other commonplace employee benefit arrangements entered into by employers and employees throughout the country.

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[1] *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *Patterson* v. *Shumate*, 504 U.S. 753 (1992); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

SUMMARY OF ARGUMENT

The Court should reverse the court of appeals' decision below.

The court of appeals' application of ERISA's fiduciary standards to Lockheed's design of its pension plan is contrary to the language and purpose of ERISA, contrary to the decisions of other courts of appeals, contrary to basic trust law principles, and inconsistent with prior decisions of the Court. ERISA's fiduciary standards apply only to the administration of a plan by the plan's fiduciaries, not to the employer's design of the plan. When an employer establishes or amends a pension plan, it acts, not as a plan fiduciary, but as the plan's settlor.

Congress, the Treasury Department, and the courts have all approved the widespread practice of offering early retirement benefits in exchange for a release or other resolution of claims against the employer. The Older Workers Benefit Protection Act shows that Congress intended to permit employers to require an employee to execute a release as a condition of receiving early retirement benefits. Treasury Department regulations recognize that pension plans may condition the receipt of benefits on the execution of a release. Other courts of appeal have upheld the validity of releases in exchange for enhanced retirement and other benefits under employee benefit plans.

Moreover, because the advantages that Lockheed derived from the releases in this case are not distinguishable from many other advantages that employers routinely receive from the employee benefit plans that they sponsor, the decision below creates uncertainty about the lawfulness of many other

conventional employment practices. Thus, the court of appeals' decision should be reversed in order to establish the lawfulness of a wide array of commonplace employee benefit arrangements entered into by employers and employees throughout the country.

ARGUMENT

I. The Decision Below Improperly Applied ERISA's Fiduciary Standards To A Plan Sponsor's Design Of An Employee Benefit Plan.

A. ERISA's Fiduciary Duty Standards Govern The Conduct Of Plan Fiduciaries.

The court of appeals held that because Lockheed derived "significant" benefits from the releases that the plan required of those electing enhanced retirement benefits, Lockheed violated section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if he or she knows or should know that the transaction "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." *Spink v. Lockheed Corp.*, 60 F.3d 616, 623-24 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 806 (1996).

However, section 406(a)(1) prohibits only transactions involving plan *fiduciaries*. Section 406(a)(1) provides that "a fiduciary" shall not cause a plan to engage in certain prohibited transactions. Thus, section 406(a)(1) applies only if "a fiduciary" causes the transaction in question to occur. If

Lockheed did not act as a fiduciary when it amended its pension plan, it could not have violated section 406(a)(1).

B. Lockheed Did Not Act As A Fiduciary When It Amended Its Pension Plan.

In fact, the court of appeals did not find, and could not have found, that Lockheed acted as a fiduciary when it amended the plan, in light of the well established rule that an employer does not act as a fiduciary when it acts to establish, amend, or terminate a plan. All of the courts of appeals that have considered the matter have distinguished between plan administration, to which ERISA's fiduciary duties apply, and plan design, which is reserved to the employer in its capacity as settlor and is not subject to the fiduciary duties that apply to plan administration.[2]

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[2] *See, e.g.*, *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995) ("a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be"); *Siskind v. Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995) ("An employer that designs [an early retirement] plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary"); *Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 115 S. Ct. 377 (1994) (roles of plan administrator and plan sponsor are distinct); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (when amending a plan, an employer does not act as a fiduciary); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer-administrator "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator, not when, *e.g.*, amending a plan); *Trenton v, Scott Paper Co.*, 832 F.2d 806, 808-09 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (design of early retirement plan "was purely a corporate management decision").

For example, in *Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333 (7th Cir. 1995), the Seventh Circuit considered the lawfulness of a scholarship loan agreement under which an ERISA-governed apprenticeship training fund made a loan to an apprentice. Under the loan agreement, the apprentice was required to repay the loan only if he worked for a non-contributing employer within the electrical industry. If he worked for a contributing employer, or if he left the electrical industry altogether, he was not required to repay the loan. These conditions obviously were designed to benefit the contributing employers.

After the district court held that the loan program violated ERISA (on the theory that the loan terms impermissibly benefited contributing employers), the Seventh Circuit reversed on the ground that the district court had

> failed to recognize the distinction between the scope of fiduciary duties owed during plan administration and the lack of fiduciary duties owed during plan design or amendment.
>
> . . . As this Circuit has previously noted, it would contravene Congress's intent for this Court to dictate the content of a welfare benefit plan. As such, this Circuit has held that "an employer unilaterally may change or abolish [a welfare benefit plan] without violating ERISA."

67 F.3d at 1338 (citations omitted).[3]

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[3] Apprenticeship and training programs are classified as welfare plans under ERISA. ERISA's fiduciary duty provisions apply to both welfare (continued...)

This well accepted view is compelled by ERISA's definition of a "fiduciary," which provides, in general, that a person is a fiduciary of a plan only "to the extent" that he or she has control or authority over "management" or "administration" of the plan or "management or disposition of its assets." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Because Lockheed was not engaged in the management or administration of the plan or its assets when it amended the plan, it was not acting as a fiduciary and could not possibly have violated section 406(a)(1)(D).

The court of appeals argued that because section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," 60 F.3d at 623, so too section 406(a)(1)(D) must prohibit plan amendments that result in plan funds being used to buy releases. This facile argument is not only inconsistent with a literal reading of section 406(a)(1)(D) (which on its face applies only to fiduciaries), but also ignores the fact that Lockheed, like other employers, is free under ERISA to terminate its pension plan and thereafter to use the plan's surplus for any purpose the employer deems appropriate, including the purchase of releases.[4] The termination of a

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[3](...continued)
plans and pension plans. *See* ERISA §§ 3(1), 401(a), 29 U.S.C. §§ 1002(1), 1101(a).

[4] *See, e.g., District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to Hon. Edward R. Roybal, Chairman, House Select Committee on Aging, *reprinted in* 13 BNA Pension Reporter 2080, 2081 (Nov. 18, 1986); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to John N. Erlenborn, Chairman, Advisory Council on Employee Welfare & Pension Benefit Plans, *reprinted in* 13 BNA Pension Reporter 472 (Mar. 13, 1986).

pension plan and recovery of the plan's surplus assets by the employer are permissible under ERISA for the same reason that Lockheed's plan amendment is permissible: they involve questions of plan design, which are simply not governed by ERISA's fiduciary duties.

In *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the Court recognized that ERISA's fiduciary duty provisions are not designed to regulate an employer's role as the settlor of pension and welfare benefit plans. The Court distinguished the role of a plan's fiduciaries from the role of the collective-bargaining representatives of employers and unions in designing the plan, and ruled that while the plan's fiduciaries owe a duty of loyalty to the plan's beneficiaries, the collective-bargaining representatives are expected, in bargaining over the design of the plan, to advance the interests of the parties they represent:

> The duties of an employer-appointed trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to both of these activities [of employer-representatives in collective bargaining].

453 U.S. at 338.

Similarly, last Term, in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), the Court recognized that an employer does not act as a fiduciary when it amends or terminates an ERISA-governed plan in a nonunion context:

> Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan").

Regardless of whether its employees are represented by a union, the employer acts to advance its own interests when it designs an employee benefit plan for its employees; it does not act, and ERISA does not require it to act, as a fiduciary. In acting as settlor, the employer must be "completely faithful to [its own] interests." *Amax Coal Co., supra,* 453 U.S. at 327. *See also Curtiss-Wright Corp., supra,* 115 S. Ct. at 1230 (1995) (sharply distinguishing the process of amending the plan from the process of administering the plan).[5]

The error of the court of appeals' decision is illustrated by the following example. Suppose that Lockheed had spun off part of its existing pension plan into a new pension plan with enhanced benefits for employees who had previously released Lockheed from liability for its past conduct. Since the employees participating in the spun-off plan would receive enhanced benefits from the plan, ERISA would not give them any basis for complaining about the design of the spun-off plan. Nonparticipating employees would have no basis for complaint either, since the fiduciaries of the spun-off plan would owe a duty only to that plan's participants and beneficiaries. The employees who continued to participate in

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[5] *See also infra* p. 27 (an employer realizes advantages from an early retirement incentive plan that does not require employees to execute a release).

Lockheed's existing plan (and who were not covered by the spun-off plan) could not complain about the spinoff as long as the spinoff complied with the ERISA rules governing plan spinoffs,[6] because "ERISA's fiduciary principles protect employees' claims to accrued benefits, not their ownership of pension fund assets." *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 374 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986); *see also Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341, 1344 (8th Cir. 1988) (although allocation of a plan's excess assets to a spun-off plan would benefit the sponsor of the spun-off plan, ERISA's fiduciary standards do not give employees a basis to complain about it); *Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4 (6th Cir. 1988) (same); *Foster Medical Corp. Employees' Pension Plan v. Healthco, Inc.*, 753 F.2d 194 (1st Cir. 1985) (same).

The fact that Lockheed provided enhanced benefits by amending an existing plan, rather than by spinning off a portion of its existing plan, does not change the result. In each case, ERISA's fiduciary standards simply do not apply. As the Sixth Circuit has observed:

> The language of ERISA stating that "the assets of a plan shall never inure to the benefit of any employer" cannot be read as a prohibition against any decisions of an employer with respect to a pension plan which have the obvious primary purpose and effect of benefitting the employees, and in addition the incidental side effect of being prudent from the employer's economic perspective. As the legislative history makes clear, ERISA recognizes the inherent tension between the desire that employees retire with adequate retirement income and the practical internal pressures exerted on the trustees charged with preserving the assets of the pension fund. While ERISA resolves this conflict resoundingly on the side of the employees, Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interests of the preservation of the fund and which are also not adverse to the employer's interests.

Holliday v. Xerox Corp., 732 F.2d 548, 551-52 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984).[7]

[6] *See* ERISA § 208, 29 U.S.C. § 1058.

[7] *Holliday* involved an employer's decision to transfer the assets allocable to certain participants from one account in the employer's pension plan to another account. The retirement benefits payable out of the *transferee account* were subtracted as a set-off in calculating the amount of benefits to which each employee was entitled under the employer's new guaranteed minimum pension plan. Because the retirement benefits payable out of the *transferor account* were not taken into account in calculating the employee's benefit under the new guaranteed minimum pension plan, plaintiffs claimed that the transfer and subsequent use of the transferred funds as a set-off violated ERISA's prohibition against the reversion of plan assets to the employer prior to the termination of the plan. The court rejected this claim on the ground that ERISA does not prohibit a pension plan from providing benefits to employees in a fashion that also benefits the employer. *See also United Steelworkers of America v. Cyclops Corp.*, 860 F.2d 189, 200-01 (6th Cir. 1988) (spinoff of part of pension plan is not a breach of fiduciary duty, regardless of benefit to employer).

C. ERISA's Fiduciary Duty Provisions Were Designed To Protect Employee Benefit Plans From Abuses In The Management Of Plan Assets, Not To Regulate The Design Of Employee Benefit Plans.

As the Court has recognized, ERISA's fiduciary standards are based on trust law principles and should be interpreted in accordance with those principles:

> ERISA abounds with the language and terminology of trust law. *See, e.g.*, 29 U.S.C. §§ 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1103(a) ("trustee"), 1104 ("fiduciary duties"). ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, p. 11 (1973). Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, [481 U.S. 41,] 56. *See also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26 (1983) ("'[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans'") (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989); *see also Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993) (ERISA's roots are in the common law of trusts).

Under basic trust law principles, "settlors generally are uninhibited in crafting original trust instruments or permitted amendments." *Sinai Hosp. of Baltimore, Inc. v. Nat'l Ben. Fund*, 697 F.2d 562, 568 (4th Cir. 1982) (citing authorities). Only last Term, the Court applied basic trust law principles to conclude that an employee benefit plan met ERISA's requirement that a plan contain an amendment procedure. In *Curtiss-Wright Corp., supra,* the Court relied on trust law to find that the ERISA requirement for having a plan amendment procedure was met by reference to corporate law:

> In order for an amendment procedure that says the plan may be amended by "[t]he Company" to make any sense, there must be some way of determining what it means for "[t]he Company" to make a decision to amend or, in the language of trust law, to "sufficiently manifest [its] intention" to amend. Restatement (Second) of Trusts § 331, Comment *c* (1957). . . . [P]rinciples of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company.

115 S. Ct. at 1229; *see also id.* at 1230 ("for a plan *not* to have [an amendment] procedure would risk rendering the plan forever unamendable under standard trust law principles").

Curtiss-Wright Corp. supports the view that, in fixing the terms of an employee benefit plan, a corporation must act, not in accordance with ERISA's fiduciary standards (which, under

trust law, do not apply to the trust's settlor), but in accordance with corporate law standards (under which a corporation acts to advance the interests of its shareholders).[8] Consistent with this view, the prohibited transaction provisions of ERISA were designed to protect a plan from being damaged by abuses by fiduciaries in the management of plan assets, not to influence plan design or to curb the distribution of plan benefits.[9] There is no basis in the text, purpose, or legislative history of the statute for concluding that Lockheed's amendment of its plan to provide enhanced retirement benefits violated section 406(a)(1)(D).

As the First Circuit stated in *Kwatcher v. Massachusetts Serv. Emp. Pension Fund*, 879 F.2d 957, 960-61 (1st Cir. 1989):

> ERISA's framers were concerned that employers would exploit, misuse, or loot the huge reserves of funds collected for employee benefit plans. *See, e.g.*, 29 U.S.C. § 1001(a) (congressional finding that "owing to the inadequacy of current minimum standards, the soundness and stability of plans . . . may be endangered"); H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4681 (noting continued "abuses in the administration of pension plans and in the handling of pension funds"); S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4892 (similar); *id.* 4903 (acknowledging need "for more effective remedies to prevent misuse of pension funds to the detriment of . . . participating employees").[10]

[8] *See generally* FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 837.50 *et seq.* (1994 Rev. Vol.).

[9] *See Commissioner v. Keystone Consol. Indus.*, 113 S. Ct. 2006, 2012 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."); *Milwaukee Area Joint Apprenticeship Training Comm., supra*, 67 F.3d at 1338 (Congress did not intend ERISA's fiduciary responsibility provisions to dictate the terms of a plan); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974) ("Under the labor provisions (title I), *the fiduciary is the main focus of the prohibited transaction rules*.") (emphasis added); S. Rep. No. 383, 93d Cong., 1st Sess. 99 (1973) ("To prevent discrimination against fiduciaries and parties in interest, the bill permits these persons to receive any benefits to which they are entitled as participants or beneficiaries in the plan."); H.R. Rep. No. 533, 93d Cong., 1st Sess. 7, 11-13, 21 (1973) (fiduciary responsibility provisions are concerned with plan administration and operation).

The legislative history contains not the slightest suggestion that ERISA's prohibited transaction provisions were intended to govern the terms of the plan itself. *See White v. Distributors Ass'n Warehousemen's Pension Trust*, 751 F.2d 1068, 1070-72 (9th Cir. 1985) (ERISA not intended to impose fiduciary duties on parties to collective bargaining agreements who design a benefit plan).[11]

[10] *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (principal statutory duties relate to the management of plan assets, maintenance of records, disclosure of information, and avoidance of conflicts of interest).

[11] Other provisions of ERISA explicitly regulate the content of a pension plan. *See, e.g.*, ERISA §§ 202-06, 402, 29 U.S.C. §§ 1052-56, 1102. Under those provisions an employer could not, for example, condition an employee's ability to receive retirement benefits that he or she had *already earned* on the employee's execution of a release; the introduction of such a condition would violate ERISA's vesting and benefit accrual rules. *See* ERISA §§ 203(c)(1)(A), 204(g), 29 U.S.C. §§ 1053(c)(1)(A), 1054(g). By contrast, there is nothing in § 406(a) of

(continued...)

II. The Decision Below Is Irreconcilably In Conflict With The Actions Of Congress, The Treasury Department, And The Courts That Uphold The Widespread Practice Of Offering Early Retirement Benefits In Exchange For A Release Or Other Resolution Of Claims Against An Employer.

A. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread.

During the 1980's and 1990's, international competitive pressures, technological changes, and down-turns in economic activity have forced many large U.S. employers to make substantial reductions in their workforces. Downsizing is not limited to employers whose overall business is temporarily or permanently contracting, however. Even an employer whose overall business and workforce are growing might need to reduce particular divisions or job categories in its workforce in response to competitive pressures, changing markets, or technological change.

Faced with the need to downsize some or all of its workforce, an employer has two general choices: it can downsize through voluntary incentives, such as early retirement window programs, or through involuntary measures, such as layoffs. Employers and employees generally prefer a voluntary program to the drastic approach of simply firing large numbers of employees.

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[11](...continued)
ERISA or its legislative history that suggests that § 406(a) was intended to govern the design of an employee benefit plan.

An involuntary program could well lead to the layoff of many employees who wish to continue working, yet leave in place other employees who are on the verge of leaving anyway, either for retirement or alternative employment. By contrast, a voluntary program allows eligible employees to decide for themselves whether they wish to continue working for the company or to leave the company with enhanced benefits. Moreover, in many cases a voluntary program permits an employee to retire early with benefits that are comparable to or better than the benefits the employee would receive if he or she continued to work and retired several years later. Voluntary programs thus provide opportunities and benefits that generally are not available under involuntary programs.

Offering employees a special additional incentive to retire voluntarily during a designated period of time (often referred to as an "early retirement window") can reduce and sometimes eliminate the need for involuntary reductions-in-force and create opportunities for younger employees.[12] The use of early retirement incentives "is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees . . . ." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).[13]

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[12] Hewitt Associates, Plan Design and Experience in Early Retirement Windows and in Other Voluntary Separation Plans 5 (1986).

[13] "Provided the employee may decline the offer and keep working under lawful conditions, the offer [of enhanced early retirement benefits] makes him better off. He has an additional option, one that may be . . . worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new

(continued...)

The use of releases in connection with early retirement incentive programs is widespread. "About 80 percent of *Fortune* 100 companies sponsored an exit incentive program at least once during 1979 through 1988 . . . about 55 percent of a sample of large companies (25,000 or more employees) offered such programs at least once between 1981 and 1985." U.S. General Accounting Office, Age Discrimination: Use of Waivers by Large Companies Offering Exit Incentives to Employees 2 (Apr. 1989) (footnote omitted) ("1989 GAO Report"). In fact, for some employers, early retirement incentives are a routine way to thin the ranks of their employees. The 1989 GAO Report's survey of *Fortune* 100 companies found that 80 percent of those companies sponsored an exit incentive program at least once between 1979 and 1988, and that about 61 percent did so more than once. *Id.* at 4.[14]

The use of early retirement incentive plans has not abated since the 1989 GAO Report. A 1994 survey report by The Wyatt Company found that of the 388 companies with defined benefit pension plans that responded to the survey, 27 percent had offered at least one early retirement incentive plan between 1991 and 1993 and that, of the companies offering

[13](...continued)
leisure." *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987). *See also* S. Rep. No. 263, 101st Cong., 2d Sess. 52 (1990) ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . . .").

[14] In 1992, the Internal Revenue Service, in response to requests from major employers, ruled that, in appropriate circumstances, an employer may make repeated offerings of early retirement incentive benefits without causing those benefits to become a permanent feature of the employer's pension plan. *See* Rev. Rul. 92-66, 1992-1 C.B. 92.

early retirement incentive plans, 20 percent offered more than one plan during the 1991-1993 period. The Wyatt Company, Survey Report: Designing an Effective Early Retirement Window 2 (1994).[15]

Many employers offering early retirement incentive plans require eligible employees to waive employment-related claims as a condition of receiving enhanced retirement benefits. The 1989 GAO Report found that about 30 percent of the *Fortune* 100 companies that sponsored an exit incentive program required employees to sign a waiver in order to receive enhanced benefits. 1989 GAO Report 2. Another study found that about 25 percent of the companies with early retirement incentive programs required releases as a condition of receiving enhanced benefits. Grant, *The "Open Window" — Special Early Retirement Plans in Transition*, 16 Employee Benefits Journal 10, 15 (1991).

B. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases.

Congress has approved the practice of offering exit incentive benefits to employees who execute releases. The Older Workers Benefit Protection Act of 1990, Pub. L. No.

[15] "The number of companies [participating in the survey] offering windows rose steadily from 22 (roughly 4% of all respondents) in 1989 to 59 (slightly more than 11%) in 1992." Towers, Perrin, Forster & Crosby, Inc., Monitor (Sept. 1922). *See also* Hewitt Associates, Early Retirement Windows, Lump Sum Options, and Postretirement Increases in Pension Plans 1 (1992) ("Hardly a week passes without mention in the popular press of another company offering an early retirement window program.").

101-433, 104 Stat. 978 ("OWBPA"), provides that it is not a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, for the employer to observe the terms of a "voluntary early retirement incentive plan" if the plan is "consistent with the relevant purpose or purposes of this Act." OWBPA, § 103, amending 29 U.S.C. § 623(f)(2). In addition, the OWBPA recognizes that a release or waiver may be given "in connection with an exit incentive or other employment termination program offered to a group or class of employees," and specifies the standards that a waiver must meet in these circumstances in order to be enforceable. *See* OWBPA § 201, amending 29 U.S.C. § 626(f)(1).[16]

The OWBPA thus shows that Congress intended to permit employers to require a waiver of ADEA claims as a condition of receiving early retirement benefits, and neither the OWBPA nor its legislative history contains the slightest suggestion that a waiver under an early retirement incentive plan violates ERISA. This certainly was not because Congress had forgotten about ERISA; the OWBPA provisions governing early retirement benefits refer specifically to ERISA. *See* OWBPA § 103, amending 29 U.S.C. § 623(*l*)(1).

[16] "S. 1511 permits early retirement incentive plans that are both truly voluntary and consistent with the relevant purpose or purposes of the ADEA. . . . In addition, if a waiver is requested from a group of employees as part of an exit incentive program, the following additional procedural requirements must be met: the employer must provide specific information about the eligibility factors for inclusion of individuals in the program and the age profiles of individuals who are included in and excluded from the program." 136 Cong. Rec. H8618-19 (daily ed. Oct. 2, 1990) (Explanation of S. 1511).

It is implausible that when it enacted the OWBPA to regulate the practice of requiring a waiver of ADEA claims as a condition of receiving enhanced early retirement benefits, Congress was approving a practice that was prohibited by ERISA.[17]

C. Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases.

Treasury Department regulations recognize that pension plans may condition the receipt of benefits on covenants not to compete and on waivers as long as the Internal Revenue Code's nondiscrimination standards are met and the provision does not cause an employee to lose vested benefits.[18] The Treasury Department's views are entitled to deference and dictate reversal of the court of appeals' decision, which failed even to refer to the Treasury Department's regulations.[19]

[17] *See also infra* pp. 25-26 (pension benefits may be used to offset employer's obligation under Davis-Bacon Act).

[18] *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan). In addition, the Internal Revenue Service has ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* Tech. Adv. Mem. 9516005 (Dec. 22, 1994).

[19] ERISA's prohibited transaction provisions appear in both Title I and Title II of ERISA. The Department of Labor is principally responsible for the administration of the Title I provisions, while the Treasury

(continued...)

The Treasury's regulations would be meaningless if ERISA prohibited an employer from amending a plan to impose a waiver requirement. It is implausible, to say the least, that this expert federal agency, which is responsible for the administration of the ERISA provisions that appear in the Internal Revenue Code, would have issued regulations that explicitly sanction a practice that ERISA forbids.

D. Other Appellate Courts Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Retirement Benefits.

The court of appeals' opinion fails to recognize that other courts have upheld the validity of releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[20] These cases contain not the slightest suggestion that the releases violated ERISA.

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[19](...continued)
Department is principally responsible for the administration of the Title II provisions. The standards of conduct established by the two sets of prohibited transaction provisions are nearly identical. *Compare* ERISA §§ 406-08, 29 U.S.C. §§ 1106-08, *with* Int. Rev. Code § 4975. *See generally* H.R. Rep. No. 1280, *supra*, 306-323 (explaining the operation of the Title I and Title II provisions); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (recognizing overlap of Labor and Treasury responsibilities).

[20] *See, e.g.*, *Blistein v. St. John's College*, No. 94-2223, 1996 WL 30672 (4th Cir. Jan. 26, 1996); *Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

The decisions in these cases would be pointless if the releases violated ERISA.[21] The decision below is thus incompatible with a sound body of law upholding the enforceability of releases given in exchange for additional benefits under ERISA-governed plans.

E. Settlements Of And Judgments In Age Discrimination Lawsuits, Including Suits Filed By The EEOC, Frequently Require An Employer To Amend Its Pension Plan To Provide Enhanced Benefits To Resolve The Claims Against The Employer.

Settlements of and judgments in age discrimination lawsuits, including suits filed by the Equal Employment Opportunity Commission ("EEOC"), frequently require defendant employers to amend their pension plans to provide enhanced benefits in exchange for the plaintiffs dropping their claims for monetary damages or agreeing to accept reduced payments directly from the defendant employer.[22] Here too.

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[21] The fact that ERISA regulates employee benefit plans is hardly an obscure or subtle point. The plaintiffs in *Astor*, *supra*, sued under ERISA, and the court emphasized that the plan was governed by ERISA. 7 F.3d at 534, 536-37.

[22] *See, e.g.*, 150 BNA Daily Labor Reporter at A-3 (Aug. 4, 1995) (consent decree in *EEOC v. McDonnell Douglas Corp.*, No. 4:93-CV-526 (E.D. Mo)); *see also* Priv. Ltr. Rul. 8536064 (June 12, 1985) (additional pension benefits provided as part of settlement of class action challenging termination of health benefits).

The EEOC Compliance Manual, a compilation of instructions, legal interpretations, and policy guidance provided to agency staff, contains statements that confirm the view that the EEOC routinely enters into settlement agreements that discharge the employer from further liability in

(continued...)

under the rationale of the court of appeals, these are prohibited transactions akin to an employer's writing checks on a pension fund in order to settle lawsuits. There is no evidence to suggest that ERISA was intended to bar these judgments and settlements.

III. Because The Advantages That Lockheed Derived From The Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, The Decision Below Is Inconsistent With The Lawfulness Of Many Other Widespread Employment Practices.

In holding that Lockheed violated section 406(a)(1)(D) of ERISA because Lockheed derived "significant" benefits from the releases, the court of appeals failed to recognize that the advantages Lockheed derived from its early retirement program are no different from many advantages that employers routinely derive from early retirement incentive offerings with no release requirement, as well as a myriad of other employee benefit plans. The availability of such advantages is a principal reason employers establish such

[22](...continued)
exchange for benefits to employees or former employees that are paid from qualified plans sponsored by the employer. *See, e.g.*, EEOC Compliance Manual, § 627.2, CCH ¶ 4902 at 4064 (quoting with approval case law indicating that a back pay award should include an increase in pension benefits to reflect the higher rate of pay the individuals would have received but for the discriminatory conduct). *Id.* at § 801, *n*.11, CCH ¶ 6519 at 5084 ("In determining a front pay award, the Commission believes that in addition to lost earnings, the entire employee benefit package should be considered"). *Id.* at §§ 1180 *et seq.*, CCH ¶¶ 7701 *et seq.* (addressing remedies to be used when pension and other benefit plans have improperly used gender-based actuarial tables).

plans,[23] and there is no reason to believe that Congress intended such advantages to violate ERISA.

Any special early retirement program, with or without a release requirement, "benefits" the employer by reducing payroll and other expenses attributable to active employees. Without that "benefit," employers would have no incentive to offer special early retirement programs. Similarly, employers negotiating with trade unions frequently reach agreements in which the *quid pro quo* for enhanced retirement benefits is lesser wage increases, outright wage reductions, or other changes in the conditions of employment that benefit the employer. Although such agreements obviously benefit the employer (for example, by reducing wage costs or at least minimizing wage increases), no court or government agency has ever suggested, or reasonably could suggest, that a negotiated exchange of enhanced retirement benefits for reduced wage costs violates ERISA.

Similarly, a government contractor may offset its prevailing wage obligation under the Davis-Bacon Act with any pension benefits it provides to its employees under an ERISA-governed plan.[24] This use of pension assets provides a benefit to the contractor that is every bit as substantial and direct as the benefits Lockheed received from the releases in

[23] ERISA neither requires an employer to adopt an employee benefit plan nor dictates the level of benefits that a plan must provide. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12 (1981); H.R. Rep. No. 533, 93d Cong., 1st Sess. 2 (1973).

[24] *See* 40 U.S.C. § 267a(b); 29 C.F.R. § 5.31 (1995); U.S. Treas. Dep't, Study of the Effect of the Minimum Participation Requirements on Government Contractors 2-6 (March 1991).

this case. The court of appeals' decision simply cannot be reconciled with the congressionally approved practice of using pension benefits to offset a contractor's prevailing wage obligation under the Davis-Bacon Act.

Some employers allow employees to participate in a pension plan only if they agree in exchange to reduce their cash compensation. By striking such a bargain, the employer reduces its wage costs, and employees obtain retirement benefits. It has never been suggested that such arrangements are unlawful and, indeed, they are expressly recognized by Treasury Department regulations. *See* Treas. Reg. § 1.401(k)-1(a)(3)(iv) (excluding from the definition of a "cash or deferred election" a one-time irrevocable election to receive contributions or benefit accruals under a pension plan); *see also* IRS Announcement 94-101, § 441.1, 1994-35 I.R.B. 53.[25]

Even where there is no explicit increase in pension benefits in exchange for a reduction in pay, such trade-offs are often made implicitly. Employers attract and retain employees on the basis of their total offerings of compensation and benefits. For example, an employer might find it cost-

[25] Both the wage-reduction arrangement permitted by Treasury Department regulations and Lockheed's early retirement incentive plan are quite different from a hypothetical arrangement one might imagine in which an employer offers additional benefits to employees who agree to remit a percentage of the additional benefits to the employer. Wage-reduction and early retirement incentive plans provide genuine pension benefits to employees. By contrast, the hypothetical benefit pass-through arrangement requires the employee to act as a conduit for the payments to be remitted to the employer; although the hypothetical employer might attempt to characterize the payments as pension benefits, the plan would, in substance, be making these payments to the employer, not to the employee.

effective to offer employees above-average retirement benefits together with below-average current compensation. In these circumstances, the employer derives a monetary benefit from its retirement plan that is no less significant or direct than the benefits Lockheed derived from the releases in this case.[26]

Likewise employers that offer early retirement incentive plans without seeking releases from their employees benefit from the resulting reductions in wage and benefit costs. Such benefits have never been found to violate ERISA even though they are plainly designed to serve the employer's business needs by reducing employee headcount.[27]

Some exit incentive programs offer severance benefits and retiree health benefits through a trust similar to a pension trust.[28] Because severance and retiree health plans are

[26] *See generally* RONALD G. EHRENBERG AND ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 394-406 (3d ed. 1988); ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 3 (1982).

[27] *See, e.g.*, *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283-84 (3d Cir. 1988); *Trenton v. Scott Paper Co.*, *supra*, 832 F.2d at 808-09. Similarly, some employers offer early retirement incentive benefits only to employees who agree to work until a specified future retirement date. These employers directly benefit both from the additional services rendered by the participating employees and from the reduction in payroll costs incident to the employees' retirement.

[28] *See* 29 U.S.C. § 623(*l*)(2) (recognizing that exit incentive programs provide retiree health and severance benefits); Int. Rev. Code § 501(c)(9) (tax exemption for a voluntary employees' beneficiary association [a "VEBA"]); Treas. Reg. § 1.501(c)(9)-3(c), (d), (e) (permitting a VEBA to provide severance benefits and health benefits); *see also* Int. Rev. Code § 419A(c)(2), (3) (reserves for severance and retiree health benefits).

governed by ERISA's fiduciary responsibility provisions,[29] the court of appeals' decision applies to exit incentive plans that offer severance and retiree health benefits. According to the court of appeals' decision, an employer engages in a prohibited transaction if it uses a trust fund to provide severance or retiree medical benefits to employees who agree to terminate employment and execute a release.

In sum, the benefits Lockheed derived from its plan amendment do not differ in degree or in kind from the benefits enjoyed by employers under many commonplace arrangements. Unless ERISA has, for over 20 years and unbeknownst to Congress, employers, unions, and government agencies, outlawed countless traditional employment arrangements that employers, unions, and employees rely on every day, the court of appeals' decision must be reversed.

[29] *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the court of appeals' decision.

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No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

United States Supreme Court Cases: Page

Curtiss-Wright Corp. v. Schoonejongen, —— U.S. ——, 115 S. Ct. 1223 (1995) 7
Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 7
William J. Mertens v. Hewitt Associates, —— U.S. ——, 113 S. Ct. 2063 (1993) 4, 5, 6, 8

United States Court of Appeals Cases:

Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988) 7
Reich v. Stangl, 73 F.3d 1027 (10th Cir. 1996) 7
Spink v. Lockheed Corporation, 60 F.3d 616 (9th Cir. 1995) 6, 7

Statutes and Regulations:

Employee Retirement Income Security Act, 29 U.S.C. §§ 1101 *et seq.* 3
29 U.S.C. § 1102(14) (B) 6
29 U.S.C. § 1106 .... 6, 7, 8
20 C.F.R. § 901.20 3

Periodicals:

"Clinton's, GOP's Medicare Plans Seen As Flawed in Study by Actuaries Group," *The New York Times* (December 22, 1995) 3
"Pension Reversions Included in GOP Budget Reconciliation Plan," *BNA's Daily Report for Executives* (Nov. 20, 1995) 3
"Superfund Sites, Costs Overstated, American Academy of Actuaries Says," *Insurance Record* (Oct. 12, 1995) 3
"Clinton Plan Provides Safe Harbors," *Pension Management* (Sept. 1995) 3

Miscellaneous:

Article I, Name and Purpose, *Bylaws of the American Society of Pension Actuaries* 2
Mission Statement, *Strategic Plan 1995-2000 of the American Academy of Actuaries* (1994) 2
Article IX, *Bylaws of the American Academy of Actuaries* (as amended, 1995) 3

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BRIEF OF *AMICI CURIAE* THE AMERICAN ACADEMY OF ACTUARIES AND THE AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONERS

The American Academy of Actuaries and the American Society of Pension Actuaries submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, in support of petitioners in No. 95-809, having obtained the written consent of both the petitioners and respondent to do so. Said consent accompanies this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Academy of Actuaries (the "Academy") is a nonprofit professional association established in 1965 to provide a common membership organization for ac-

tuaries of all specialties (including pension and health) practicing in the United States. To become an Academy member, an actuary must satisfy rigorous education and experience requirements. Membership in the Academy is a prerequisite in many states for actuaries to be eligible to perform certain statutorily-required professional services. The Academy's membership exceeds 12,000 actuaries nationwide.

To articulate its purpose and guide its activities into the next century, the Academy in 1994 adopted the following Mission Statement:

> To ensure that the American public recognizes and benefits from (1) the independent expertise of the actuarial profession in the formulation of public policy, and (2) the adherence of actuaries to high professional standards in discharging their responsibilities.

Mission Statement, *Strategic Plan 1995-2000 of the American Academy of Actuaries* (1994).

The American Society of Pension Actuaries ("ASPA") is a nonprofit professional society whose members provide actuarial, administrative, consulting and other services for approximately one-third of the qualified pension plans in the United States. ASPA was established to

> advance actuarial science as applied to pension plans, promote high professional and ethical standards among its membership, facilitate the assembly of pension actuaries and consultants for the discussion of professional matters, and inform the public of the nature of the profession of the pension actuary and consultant."

Article I, Name and Purpose, *Bylaws of the American Society of Pension Actuaries.*

The Academy and ASPA have adopted a Code of Professional Conduct to govern the professional ethics of

their members.[1] Members who breach the Code may be publicly reprimanded, or suspended or expelled from membership. *See, e.g.*, Article IX, Sections 2 and 3, *Bylaws of the American Academy of Actuaries* (1995).[2]

The Academy regularly provides unbiased expertise to state legislatures, regulatory agencies and Congress on the actuarial implications of regulatory and legislative proposals involving insurance, health care and retirement income security.[3] ASPA, too, provides legislators and regulators with expert advice on the nation's pension system.[4] The Academy also participates as an *amicus curiae* in court cases with significant actuarial implications. For ex-

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[1] The Code of Professional Conduct and relevant portions of the Academy's bylaws are reproduced in the Appendix to this brief.

[2] To be eligible to provide actuarial services to employee benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101 *et seq.*, an actuary must be licensed by the Joint Board for the Enrollment of Actuaries (the "Joint Board") of the United States Departments of Labor and the Treasury. The Joint Board has adopted its own regulations to govern the professional conduct of enrolled actuaries. *See* 20 C.F.R. § 901.20. Nearly all enrolled actuaries are members of the Academy or ASPA, and are subject to oversight by the Joint Board and the Academy, ASPA or both.

[3] The Academy recently identified flaws in Medicare reform plans put forward by both the Clinton Administration and Republican members of Congress. "Clinton's, GOP's Medicare Plans Seen As Flawed in Study by Actuaries Group," *The New York Times* (December 22, 1995). Last year, the Academy provided Congress with an analysis of costs to clean up sites on the Superfund National Priorities List. "Superfund Sites, Costs Overstated, American Academy of Actuaries Says," *Insurance Record* (Oct. 12, 1995). The Academy also advised Congress on a proposal to amend ERISA to allow employers to recapture "excess" plan assets. "Pension Reversions Included in GOP Budget Reconciliation Plan," *BNA's Daily Report for Executives* (Nov. 20, 1995) (citing letter of Pension Committee of the Academy).

[4] *See, e.g.*, "Clinton Plan provides Safe Harbors," *Pension Management* (Sept. 1995).

ample, in 1992 the Academy submitted an *amicus curiae* brief in support of the respondent in *William J. Mertens v. Hewitt Associates*, —— U.S. ——, 113 S. Ct. 2063 (1993) ("*Mertens*").

In *Mertens*, the Academy advised this Court that its many members who provide professional services to ERISA plans "work closely with plan fiduciaries," and could be significantly affected by the Court's ruling on whether non-fiduciaries could be held liable under ERISA for knowing participation in a fiduciary's breach of duty. The lower court's "party in interest" analysis in this case appears inconsistent with the Court's holding in *Mertens*. If left unaddressed, the lower court's reasoning may raise serious questions as to whether actuaries who provide professional services to ERISA plans but do not function as fiduciaries should nonetheless be subject to fiduciary liability. Such a result could be seriously injurious to practicing pension actuaries and, therefore, the Academy and ASPA have a substantial interest in that aspect of this case.[5]

SUMMARY OF ARGUMENT

This Court drew a clear distinction in *Mertens* between fiduciaries and non-fiduciary service providers for purposes of imposing fiduciary liability under ERISA. The lower court's decision threatens to blur this important distinction. The lower court found that petitioner Lockheed Corporation ("Lockheed") had engaged in a series of prohibited transfers of plan assets to itself as a "party in interest." ERISA clearly provides that only a fiduciary can initiate such prohibited transactions. However, the lower court expressly declined to rule whether Lockheed was acting as a fiduciary when it amended the plan (the only obvious point at which prohibited "party in interest" transactions could have been initiated), and failed to identify any other fiduciary act of Lockheed that could have initiated prohibited "party in interest" transactions. Thus the question of precisely what, if any, fiduciary action Lockheed took remains unanswered.

[5] This brief will address only the implications of the lower court's "party in interest" analysis, and will not argue the merits of other aspects of this case.

Unless this aspect of the lower court's decision is expressly addressed by the Court, federal courts in the Ninth Circuit and elsewhere will be left to struggle with the precedential effect of the lower court's reasoning when attempting to determine what kinds of actions constitute fiduciary transfers of plan assets to a "party in interest." In doing so, they may well exceed the existing definition of "fiduciary activity" under ERISA, expanding that definition to include actions that are currently undertaken by actuaries and other service providers on a non-fiduciary basis (for example, setting assumptions that reduce the employer's contribution). The Academy and ASPA urge the Court to address this aspect of the lower court's decision, and to emphasize that only fiduciaries as they are currently defined under ERISA can engage in fiduciary activity (again, as currently defined) and, thereby, be exposed to fiduciary liability.

ARGUMENT

In *Mertens*, this Court addressed the issue of whether actuaries who provided professional services to an ERISA plan, but who did not have control over the plan's assets, could be held liable for knowing participation in an alleged breach of duty by the plan's administrators.[6] The Court held that ERISA provides an express scheme of statutory remedies that does not include a cause of action for money damages against non-fiduciaries for knowing participation

[6] *Mertens* came before the Court on a motion to dismiss; the petitioners' allegations were, therefore, taken as true. 113 S. Ct. at 2065. Specifically, petitioners claimed that the plan's actuaries had knowingly acquiesced in the administrators' setting of unreasonable actuarial assumptions for the plan. *Id.* at 2065-66.

in a fiduciary's breach. 113 S. Ct. at 2066-68, 2071. In reaching this determination, the Court recognized that professional service providers such as actuaries are not liable as fiduciaries until they "cross the line from advisor to fiduciary," *id.* at 2071, by obtaining the control over plan assets that is required to confer fiduciary status and liability under ERISA. The Court, therefore, drew a clear distinction between service providers (who may be "parties in interest" under 29 U.S.C. § 1002(14)(B)) and fiduciaries for purpose of liability for money damages under ERISA.

The lower court's reasoning in this case threatens to blur *Mertens'* careful distinction between fiduciaries and service providers. Here, Lockheed amended its plan to offer increased retirement benefits (paid from the plan's surplus assets) to employees who volunteered for early retirement. To be eligible to participate in the early retirement program, employees were required to waive potential employment-related claims they might have against Lockheed. *Spink v. Lockheed Corporation,* 60 F.3d 616, 618-19 (9th Cir. 1995). There is no allegation that any plan assets were transferred directly to Lockheed from the plan. The lower court held that Lockheed, by using plan assets to "purchase" releases from its retiring employees, had initiated a series of transfers of plan assets to itself as a "party in interest," in violation of 29 U.S.C. § 1106. *Id.* at 623-24.

Section 1106 clearly prohibits *fiduciaries* from causing the plan to engage in prohibited "party in interest" transactions, and contemplates that a *fiduciary* must have initiated the transaction at issue. 29 U.S.C. § 1106 ("A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . ."). The lower court, therefore, should have determined that Lockheed took

some fiduciary action as a necessary predicate to a breach of 29 U.S.C. § 1106. However, the lower court expressly declined to rule on the issue of whether Lockheed acted as a fiduciary when it amended the plan (the most obvious "triggering event" for the allegedly prohibited transactions). 60 F.3d at 623 n.5. Further, the lower court failed to pinpoint specifically any other fiduciary act of Lockheed that might have initiated prohibited "party in interest" transactions.[7]

This Court has held that employers "are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans," *Curtiss-Wright Corp. v. Schoonejongen,* —— U.S. ——, 115 S. Ct. 1223, 1228 (1995), and that plans may be freely amended so long as the substantive conditions established by ERISA (*e.g.*, minimum funding, vesting and participation requirements) are satisfied. *Id.; Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 91 (1983). These holdings clearly suggest that the employer does not act as a fiduciary when amending an ERISA plan. The lower court, however, may have implicitly ruled to the contrary (while refusing explicitly to do so). Alternatively, the lower court may have ignored 29 U.S.C. § 1106's requirement that a *fiduciary* initiate a prohibited "party in interest" transaction, or it might have perceived some other triggering fiduciary act of Lockheed without expressly identifying that act in its opinion. Conceivably, the lower court may even have ignored the distinction between fiduciaries and "parties in

[7] Some courts that have considered cases brought under 29 U.S.C. § 1106 have held that a "party in interest" who participates in a prohibited transaction may be subject to suit for equitable remedies. *See, e.g., Reich v. Stangl,* 73 F.3d 1027 (10th Cir. 1996) and cases cited therein; *see also Nieto v. Ecker,* 845 F.2d 868 (9th Cir. 1988). These holdings do not, however, impose fiduciary liability on those parties in interest. Moreover, at least one of those courts has recognized that "the transactions specified in [29 U.S.C. § 1106] necessarily involve two parties: the fiduciary and the party in interest." *Stangl, supra.*

interest," and imposed fiduciary liability on Lockheed for acts it undertook as a "party in interest," but not as a fiduciary.

Whatever its reasoning, the lower court's decision has troubling implications for non-fiduciary service providers such as actuaries. If the lower court's "party in interest" analysis is not expressly clarified by the Court, federal courts in the Ninth Circuit and elsewhere will have to struggle with the precedential value of this mysterious aspect of the lower court's decision. In an effort to harmonize the requirements of 29 U.S.C. § 1106 with the lower court's "party in interest" analysis, the courts may well expand the functional definition of fiduciary action that is currently applied under ERISA. In doing so, they are likely to sweep in some or all of the advisory and ministerial tasks performed by actuaries and other service providers, imposing fiduciary liability upon those service providers even though they have no fiduciary responsibility for the plan.

This Court's decision in *Mertens* clearly recognizes that it is inappropriate to impose fiduciary liability upon service providers who do not possess fiduciary control over plan assets 113 S. Ct. at 2071 ("[ERISA] allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds."). Unless this Court clarifies the lower court's "party in interest" analysis, actuaries and other professionals who provide services to ERISA plans cannot anticipate when a court may deem them liable not merely as parties in interest, but as fiduciaries. For example, actuaries routinely select and apply assumptions to calculate the employer's annual contribution to the plan. If the actuary selects assumptions that reduce the employer's contribution, it is conceivable under the lower court's reasoning that the actuary would be deemed to have participated in a prohibited transfer of plan assets to the employer as a "party in interest," and that the actuary would be held liable as a fiduciary. Similarly, the actuary might advise

the employer of statutorily-permissible techniques that would reduce the employer's contribution. Again, under the lower court's reasoning, the actuary might be held liable as a fiduciary even though the actuary had no authority to implement the techniques in question. Such a result would be contrary to this Court's decision in *Mertens,* to existing law, and to fundamental fairness.

CONCLUSION

For the foregoing reasons, the Academy and ASPA respectfully request that the Court reject the lower court's "party in interest" analysis.

Respectfully submitted,

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APPENDIX

APPENDIX

Code of Professional Conduct of the American Academy of Actuaries and the American Society of Pension Actuaries

Preamble

The Precepts of this Code of Professional Conduct identify the professional and ethical standards with which an actuary must comply. The Annotations provide additional explanatory, educational, and advisory material to members of the actuarial profession on how the Precepts are to be interpreted and applied. An actuary must be familiar with, and keep current with revisions to, the Code of Professional Conduct and its Precepts and Annotations.

Professional Integrity

PRECEPT 1. An actuary shall act honestly and in a manner to uphold the reputation of the actuarial profession and to fulfill the profession's responsibility to the public.

ANNOTATION 1-1. An actuary fulfills the profession's responsibility to the public through compliance with this Code, and by offering actuarial advice, recommendations, and opinions that are the product of the actuary's exercise of professional judgment.

ANNOTATION 1-2. An actuary who pleads guilty to or is found guilty of any misdemeanor related to financial matters or any felony shall be presumed to have contravened Precept 1 of this Code, and shall be subject to the profession's counseling and discipline procedures.

ANNOTATION 1-3. An actuary shall not use a relationship with a third party to attempt to obtain illegal or materially improper treatment from such third party on behalf of a principal (*i.e.*, present or prospective client or employer).

PRECEPT 2. An actuary shall perform professional services with integrity, skill, and care.

ANNOTATION 2-1. "Professional services" refers to the rendering of advice, recommendations, or opinions based upon actuarial considerations, and also includes other services provided to a principal (*i.e.*, present or prospective client or employer) by one acting as an actuary.

Qualification Standards

PRECEPT 3. An actuary shall perform professional services only when the actuary is qualified to do so and meets applicable qualification standards.

ANNOTATION 3-1. It is the professional responsibility of the actuary to observe applicable qualification standards in the jurisdiction in which the actuary renders professional services, and to keep current regarding changes in these standards. For example, for practice in the United States, the Qualification Standards promulgated by the American Academy of Actuaries apply; for practice in Canada, the eligibility conditions promulgated by the Canadian Institute of Actuaries as set out in the Canadian Institute of Actuaries' bylaws apply.

Standards of Practice

PRECEPT 4. An actuary shall ensure that professional services performed by or under the direction of the actuary meet applicable standards of practice.

ANNOTATION 4-1. It is the professional responsibility of the actuary to observe applicable standards of practice in the jurisdiction in which the actuary renders professional services and to keep current regarding changes in these standards. For example, for practice in the United States, the Standards of Practice promulgated by the Actuarial Standards

Board apply; for practice in Canada, the Standards of Practice promulgated by the Canadian Institute of Actuaries apply.

ANNOTATION 4-2. Where there is a question regarding the applicability of a standard of practice, the professional judgment of the actuary, taking into account the applicable accepted principles of actuarial practice, shall prevail.

Disclosure

PRECEPT 5. An actuary shall, in communicating professional findings, indicate clearly that the actuary is responsible for the findings.

ANNOTATION 5-1. An actuary who makes an actuarial communication should indicate clearly the extent to which the actuary or other source(s) are available to provide supplementary information and explanation.

ANNOTATION 5-2. An actuary who makes an actuarial communication assumes responsibility for it except to the extent the actuary disclaims responsibility by stating reliance on other sources. Reliance on other sources means making use of those sources without assuming responsibility therefor. A communication making use of such reliance should define the extent of reliance. An actuary may rely upon other sources for information except where limited or prohibited by applicable standards of practice.

ANNOTATION 5-3. Any written communication of professional findings must be signed with the name of the actuary who is responsible for it. The name of an organization with which the actuary is affiliated may be incorporated into the signature, but the actuary's responsibilities and those of the organization are not affected by the form of the signature.

PRECEPT 6. An actuary shall, in communicating professional findings, identify the principal(s) (*i.e.*, the client[s] or employer[s]) for whom such findings are made and shall describe the capacity in which the actuary serves.

PRECEPT 7. An actuary shall make full and timely disclosure to a principal (*i.e.*, present or prospective client or employer) of the sources of all direct and indirect compensation that the actuary or the actuary's firm may receive in relation to an assignment for which the actuary provides professional services for that principal.

ANNOTATION 7-1. An actuary who is not financially and organizationally independent concerning any matter related to the subject of an actuarial communication should disclose to the principal any pertinent relationship that is not apparent.

ANNOTATION 7-2. "Indirect compensation" is any material consideration received from any source in relation to any assignment for which the actuary provides professional services, other than direct remuneration for those services.

ANNOTATION 7-3. Actuaries employed by firms that operate in multiple sites are subject to the requirement of disclosure of sources of compensation that the actuary's firm may receive in relation to professional services with respect to a specific assignment for that principal, regardless of the location in which such compensation is received.

Conflict of Interest

PRECEPT 8. An actuary shall not perform professional services involving an actual or potential conflict of interest unless:

(a) the actuary's ability to act fairly is unimpaired; and

(b) there has been disclosure of the conflict to all known direct users whose interests would be affected by the conflict; and

(c) all such known direct users have expressly agreed to the performance of the services by the actuary.

ANNOTATION 8-1. A "direct user" of an actuary's services is a principal (*i.e.*, present or prospective client or employer) having the opportunity to select the actuary and able to communicate directly with the actuary about qualifications, work, and recommendations.

ANNOTATION 8-2. If the actuary is aware of any significant conflict between the interests of the direct user and the interests of another party relative to the actuary's work, the actuary should advise the direct user of the conflict. The actuary should also include appropriate qualifications or disclosures in any related actuarial communication.

Control of Work Product

PRECEPT 9. An actuary shall not perform professional services when the actuary has reason to believe that they may be used to mislead or to violate or evade the law.

ANNOTATION 9-1. Material prepared by an actuary may be used by another party in a way that may influence the actions of a third party. The actuary should recognize the risks of misquotation, misinterpretation, or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly and that the actuary is identified as responsible for the material as required by Precept 5 of this Code.

Confidentiality

PRECEPT 10. An actuary shall not disclose to another party any confidential information obtained through professional services performed for a principal (*i.e.*, client or employer) unless authorized to do so by the principal or required to do so by law.

ANNOTATION 10-1. "Confidential information" refers to information not in the public domain of which the actuary becomes aware in conjunction with the rendering of professional services to a principal. It may include information of a proprietary nature, information that is legally restricted from circulation, or information that the actuary has reason to believe the principal would not wish to be divulged.

Courtesy and Cooperation

PRECEPT 11. An actuary shall perform professional services and courtesy and shall cooperate with others in the principal's (*i.e.*, client's or employer's) interest.

ANNOTATION 11-1. Differences of opinion among actuaries may arise, particularly in choices of assumptions and methods. Discussions of such differences, whether directly between actuaries or in observations made to a principal by one actuary on the work of another, should be conducted objectively and with courtesy.

ANNOTATION 11-2. An actuary in the course of an engagement or employment may encounter a situation such that the best interest of the principal would be served by the actuary's setting out an alternative opinion to one expressed by another actuary together with an explanation of the factors that lend support to the alternative opinion. Nothing in this Code should be construed as preventing the actuary from expressing such an alternative opinion to the principal.

ANNOTATION 11-3. A principal has an indisputable right to choose a professional advisor. An actuary may provide service to any principal who requests it, even though such principal is being or has been served by another actuary in the same manner.

If an actuary is invited to advise a principal for whom the actuary knows or has reasonable grounds to believe that another actuary is already acting in a professional capacity with respect to the same matter or has recently so acted, it may be prudent to consult with the other actuary both to prepare adequately for the assignment and to make an informed judgment whether there are circumstances involving a potential violation of this Code that might affect acceptance of the assignment.

The prospective new or additional actuary should request the principal's consent to such consultation. When the principal has given consent, the original actuary may require reasonable compensation for the work required to assemble and transmit the relevant information such as pertinent data, work papers, and documents. The actuary need not provide any items of a proprietary nature, such as computer programs.

Advertising

PRECEPT 12. An actuary shall not engage in any advertising or business solicitation activities with respect to professional services that the actuary knows or should know are false or misleading.

ANNOTATION 12-1. "Advertising" encompasses all communications by whatever medium, including oral communications, that may directly or indirectly influence any person or organization to decide whether there is a need for actuarial services or to select a specific person or firm to perform actuarial services.

Titles and Designations

PRECEPT 13. An actuary shall make use of membership titles and designations of an actuarial organization only in a manner that conforms to the practices authorized by that organization.

ANNOTATION 13-1. "Title" means any title conferred by an actuarial organization related to a specific position within that organization. "Designation" means a specific reference to membership status within an actuarial organization.

Collateral Obligations

PRECEPT 14. An actuary with knowledge of an apparent, unresolved material violation of this Code shall disclose such violation to the appropriate counseling and discipline body of the profession, except where the disclosure would divulge confidential information or be contrary to law.

ANNOTATION 14-1. A material violation of this Code is one that is important, has influence or effect, or affects the merits of a situation, as opposed to one that is trivial, does not affect an outcome, or is one merely of form.

ANNOTATION 14-2. Except when an actuary is prohibited by law or while the actuary is acting in an adversarial environment involving another actuary or actuaries, when the actuary becomes aware of an apparent material violation of this Code, the actuary is required to undertake promptly the following course of action:

(a) If appropriate, discuss the situation with the other actuary or actuaries and, if necessary, agree upon a course of action to ensure that the apparent violation is resolved;

(b) If (a) is not appropriate or is not successful, bring the apparent violation to the attention of the appropriate investigatory body. For example, for violations of this Code arising out of practice in the United States, the actuary should refer the matter to the Actuarial Board for Counseling and Discipline; for violations of this Code arising out of practice in Canada, the actuary should follow procedures established by the Canadian Institute of Actuaries.

PRECEPT 15. An actuary or the actuary's representative shall respond promptly in writing to any letter received from a person duly authorized by the appropriate counseling and disciplinary body of the profession to obtain information or assistance regarding possible violations of this Code.

PRECEPT 16. An actuary shall abide by this Code of Professional Conduct whenever providing professional services.

ANNOTATION 16-1. Laws and regulations may impose obligations upon the actuary. Where the requirements of law or regulation conflict with this Code, the requirements of law or regulation shall take precedence.

ANNOTATION 16-2. For professional services rendered in Canada, the rules of the Canadian Institute of Actuaries apply.

ANNOTATION 16-3. For professional services rendered in Mexico, the rules of the Colegio Nacional de Actuarios apply.

Bylaws of the
American Academy of Actuaries
(adopted in 1965, most recently amended in 1995)

* * *

Article IX
Public Discipline

Section 1. Complaints and Referrals.

A. Complaints concerning alleged violations of the Academy's Code of Professional Conduct, and all questions that may arise as to the conduct of a member, in the member's relationship to the Academy or its members, or in the member's professional practice, or affecting the interests of the actuarial profession, constitute matters for serious consideration.

B. Such complaints and questions shall be referred to the national organization responsible for professionwide counseling and discipline in the nation where the action occurred: the Actuarial Board for Counseling and Discipline (ABCD) in the United States and the Canadian Institute of Actuaries (CIA) in Canada.

Section 2. Consideration of Public Disciplinary Action.

A. The President shall appoint a six-person Disciplinary Committee from among the members of the Board to consider and act on a recommendation from the ABCD or the CIA for public discipline of an Academy member.

B. Public disciplinary action includes a public reprimand, suspension of Academy membership, or expulsion from the Academy.

C. The member who is the subject of a public disciplinary recommendation from the ABCD or the CIA shall have the right to appear personally and by counsel (at the member's expense) before the Disci-

plinary Committee to explain why that recommendation should not be followed.

D. The member involved shall be notified not less than forty-five days in advance as to the time, date, and place where the Disciplinary Committee will consider the matter. The notification may be made by certified mail or in such other manner as the Disciplinary Committee may direct. The time limit may be waived by mutual agreement of the parties.

E. An action of the Disciplinary Committee to publicly reprimand, suspend, or expel a member requires an affirmative vote of two-thirds of the whole membership of the Disciplinary Committee.

F. An action by the Disciplinary Committee to publicly reprimand, suspend the membership of, or expel a member is effective forty-five days after the date of the action, if the member does not appeal the action to the Board, and, in the event of such an appeal, the action is effective on the date when the appeal is decided by the Board.

Section 3. Appeals to the Board. A member against whom an order of public reprimand, suspension, or expulsion has been rendered shall, upon application to the Board within forty-five days after the action of the Disciplinary Committee, be entitled to appeal to the Board at its next regularly scheduled meeting, under the following conditions:

A. All rights and privileges of membership shall be retained during the pendency of the appeal.

B. The notice of appeal shall be in writing and shall stipulate that the appealing member consents to the mailing to the members of the Board of a transcript and all applicable evidence in a form approved by the Disciplinary Committee.

C. The member may appear personally and by counsel (at the member's expense) before the Board when it meets to hear the appeal.

D. The decision of the Disciplinary Committee may be affirmed, reduced, or set aside by a majority of the members of the whole Board. Members of the Board who serve on the Disciplinary Committee may participate and vote in deliberations of the Board.

Section 4. Reinstatement. An individual who has been expelled or suspended from the Academy may be reinstated only through an action of the Board of Directors.

Section 5. Confidentiality of Proceedings. Except as otherwise provided in these Bylaws or by waiver of the person under investigation, all proceedings under this Article shall be confidential and kept secret.

Section 6. Notifications.

A. The Board of Directors shall notify Academy members in all instances in which a member is subject to public discipline. At the same time notification is given to the members, the Board of Directors shall also give notice of the public discipline to all other actuarial organizations of which the individual is a member and to other organizations, including governmental entities, that, in the opinion of the Board, should also receive notice of the action. The Board of Directors may also give notice of public discipline to such newspapers or journals as it may select.

B. If the case arises from a written complaint, notice of the disposition of the case shall be furnished to the complainant.

C. In the case of an action by the Disciplinary Committee to publicly reprimand, suspend, or expel a member, the notification should take place forty-five days after the Committee's action, and, if the

member is appealing the decision to the Board of Directors, the notification should state that the decision is being appealed. Once the Board of Directors has acted on this appeal, there should be a notification of that action.

D. In the event of subsequent reinstatement of an expelled or suspended member, the Board of Directors shall give notice of such action to all members and also to entities previously advised by the Board of the expulsion or suspension.

11

No. 95-809

In The

Supreme Court of the United States

October Term, 1995

LOCKHEED CORPORATION, *et al.*,

Petitioners,

v.

PAUL L. SPINK,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Are a pension plan sponsor and plan fiduciaries liable for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), when the plan sponsor amends the terms of its pension plan to create new benefits for a voluntary early retirement program made subject to specified eligibility criteria and plan benefits are then paid to eligible participants pursuant to the terms of the amended plan?

2. Does the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA"), apply retroactively to require pension benefit accruals for years an employee lawfully was excluded from plan participation, where the legislation does not expressly require retroactive application and where there is no clear intent by Congress to impose retroactive liability for pension benefits?

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT........................ 2

ARGUMENT 5

I. SECTION 406(a) OF ERISA DOES NOT PROHIBIT AN EMPLOYER FROM RECEIVING A VALUABLE BENEFIT FROM ITS EMPLOYEES IN RETURN FOR PROVIDING BENEFITS UNDER A FUNDED EMPLOYEE BENEFIT PLAN 5

A. Paying Benefits to Participants in Accordance with the Terms of the Plan Is Not a Prohibited Transaction under Section 406(a) of ERISA.............................. 6

B. Employee Benefit Plans Could Not Function If an Employer Were Prohibited from Receiving a Valuable Benefit from Its Employees as a Condition to Eligibility for Benefits under an Employee Benefit Plan.. 8

C. By Leaving Settlor Functions Unaffected by Fiduciary Rules, ERISA Leaves Employers Free to Seek Their Own Self-interest When Determining What the Terms of Their Plans Shall Be, Including Changing or Ending Them.................................... 11

TABLE OF CONTENTS – Continued

Page

D. Blurring the Line Between Settlor and Fiduciary Functions Inevitably Destroys the Bright Line Test for Prohibited Transactions, Creating Intolerable Uncertainty for Employers and Administrators and Forcing the Federal Courts to Review Plan Amendments One by One for Validity 16

II. BY GIVING RETROACTIVE EFFECT TO OBRA '86, THE DECISION BELOW FLOUTS THE EXPRESS INTENT OF CONGRESS AND WOULD VASTLY MULTIPLY THE FINANCIAL BURDENS BEYOND WHAT CONGRESS INTENDED 22

A. The Decision below Gives Retroactive Application to the Requirement of OBRA '86 That Older Employees Be Permitted to Participate in Pension Plans 23

B. Congress Plainly Stated Its Intent That this Provision of OBRA '86 Apply Prospectively Only 25

C. Retroactive Application of OBRA '86 Would Vastly Multiply the Financial Burdens on Plans Beyond What Congress Intended 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Commissioner v. Keystone Consolidated Industries, Inc., 113 S. Ct. 2006 (1993) 12, 17

Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223 (1995) 4, 21, 22

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 20

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 29

Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. den.*, 336 U.S. 960 (1949) 8

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 22, 29

STATUTES

Employee Retirement Income Security Act of 1974:

Section 3(14), 29 U.S.C. § 1002(14) 6, 17

Section 3(21), 29 U.S.C. § 1002(21) 12

Section 202, 29 U.S.C. § 1052 .... 15, 23

Section 203, 29 U.S.C. § 1053 15

Section 204, 29 U.S.C. § 1054 15

Section 204(b)(1), 29 U.S.C. § 1054(b)(1) 23

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 14

Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) 19

Section 406, 29 U.S.C. § 1106 12

TABLE OF AUTHORITIES – Continued

Page

Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) 6

Section 408(b)(9), 29 U.S.C. § 1108(d)(9) 6, 7, 8

Section 409, 29 U.S.C. § 1109 20

Omnibus Budget Reconciliation Act of 1986:

Section 9201, amending section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(i)(1) 26

Section 9203(a), 100 Stat. 1979 (1986) 24

Section 9204(b), 100 Stat. 1980 (1986) 24, 25

REGULATIONS

26 C.F.R. § 1.411(a)-4(a) and (c) (Example 1) 16

29 C.F.R. § 2530.203-3(a) 16

LEGISLATIVE HISTORY

H.R. Rep. 93-1280, 93d Cong., 2d Sess. (1974) 7, 17, 24

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974) 24

S. Rep. No. 93-383, 93d Cong., 2d Sess. (1973) 17

OTHER AUTHORITIES

Employee Benefits Law (Bureau of National Affairs 1991) 8

TABLE OF AUTHORITIES – Continued

Page

Top 50 – A Survey of Retirement, Thrift, And Profit Sharing Plans Covering Salaried Employees of 50 Large U. S. Industrial Companies as of January 1, 1988, The Wyatt Company (1988) 29

Trends in Pensions 1992, U. S. Department of Labor, Pension and Welfare Benefits Administration...14, 28

W. Fratcher, *Scott on Trusts* (4th ed. 1989):

§§ 3-4 at 51-53 13

§ 330 at 344-345 13

§ 331 at 378-381 13

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents over 215,000 businesses and professional organizations, as well as several thousand state and local chambers of commerce, and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases pending or recently decided in this Court: *Varity Corp. v. Howe*, 115 S. Ct. 179 (1995), *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), *District of Columbia v. The Greater Washington Board of Trade*, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. In particular, they have a substantial interest in ensuring that the statute is interpreted and applied in a uniform and consistent manner across the nation, because many of these plans cover participants and beneficiaries in multiple states.

The misguided decision below, which subjects plan sponsors to fiduciary responsibility when amending their plans (including the prohibited transaction rules), casts doubt on the validity of most amendments to funded employee benefit plans covered by ERISA, such as pension plans, both retroactively and prospectively, thus casting employers and plan administrators into doubt about the terms of their plans and inevitably enmeshing the federal courts in reviewing the merits of each plan amendment. In addition, for those employers who lawfully excluded from their pension plans employees who were hired within five years of normal retirement age, the decision below imposes retroactive liability that vastly multiplies the funding burden, compared to the prospective liability that Congress clearly intended to impose, thus endangering the maintenance and improvement of pension plans contrary to the intent of Congress.

Petitioner and respondent have both consented to the Chamber's filing of a brief *amicus curiae* in this matter. A copy of their joint consent letter, the original of which has previously been filed with the Court, is filed simultaneously herewith.

SUMMARY OF ARGUMENT

I. The decision below rests on the erroneous proposition that section 406(a) of ERISA prohibits an employer from receiving a valuable benefit from its employees in return for providing benefits under a funded employee benefit plan. Embedded in that proposition is the equally erroneous corollary that an employer acts in a fiduciary capacity when setting the terms and conditions of an employee benefit plan.

Common sense dictates that the decision below be approached with skepticism because, if those propositions were true, employee benefit plans simply could not function. In a free market economy, an employer always

provides employee benefits in return for valuable benefits from the employee, starting with simple labor but often involving direct monetary benefit as well. And the settlor function (where the settlor is expected to act in its own best interest) is inherently incompatible with fiduciary rules (where the fiduciary must act solely in the interest of the participants in the plan).

The language, structure and policy of ERISA all clearly reflect the demarcation between the traditional settlor function and the traditional fiduciary functions. The statutory definition of fiduciary, which consists of a description of functions, includes no settlor functions. While fiduciary functions are regulated by the fiduciary responsibility rules of Part 4 of Title I of ERISA, Congress chose instead to regulate the settlor function with substantive minimum standards, which appear in Part 2 of Title I. Finally, the policy of ERISA is not to regulate the contents of the promise (the settlor function), only to assure that whatever promise the employer makes is kept (the fiduciary function).

The natural temptation to decide that the performance of the settlor function usually is *not* subject to fiduciary responsibility but sometimes *is* (as the court of appeals did) cannot be gratified without invoking a judgment of degree that destroys the "bright line" test for prohibited transactions that Congress carefully constructed in section 406 of ERISA. If the existence of a prohibited transaction (and therefore the validity of an amendment) rested on a judgment of degree, such as whether the benefit to the employer from the amendment is more than "incidental," then employers would be uncertain about the validity of most amendments previously made to pension plans, as well as the validity of future plan amendments. Plan administrators would be placed in the untenable position of not knowing for sure the terms of the plans they administer, with the threat of

personal liability for implementing an amendment later determined to have been a prohibited transaction.

Perhaps worst of all, however, if the validity of plan amendments depended on a judgment of degree, the federal courts would be enmeshed in deciding the validity of countless individual plan amendments. In many cases, employees would challenge unfavorable amendments. In many others, the plan administrator would seek declaratory judgment to settle the terms of the plan. Since these actions would involve fiduciary responsibility under ERISA, the jurisdiction of the federal courts would be exclusive. In this regard, the decision below carries much the same effects as the court of appeals decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995), and makes an equally compelling case for reversal.

II. As to the second question presented, the decision below applies the Omnibus Budget Reconciliation Act of 1986 ("OBRA '86") retroactively, in disregard of the express intent of Congress that application be prospective only. ERISA, as originally enacted, permitted plans to exclude from participation employees who were hired less than five years before normal retirement age (for reasons of cost), and Mr. Spink was lawfully excluded from the Lockheed pension plan when hired in 1979 at age 61.

In OBRA '86 Congress reversed itself and required plans to admit older employees, despite the cost, but "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." Accordingly, the Lockheed pension plan permitted Mr. Spink to participate from and after the effective date of OBRA '86 in 1988. By requiring that Mr. Spink be given credit for the period from 1979 to 1988 – when he was lawfully excluded from the plan – the decision below gives retroactive effect to OBRA '86 contrary to the express intent of Congress.

Retroactive application of OBRA '86 does not impose just a marginal increase in cost on pension plans, however. Retroactive application produces a "multiplier" effect. If an older employee participates in a plan *prospectively* after OBRA '86, he may accrue a benefit based on just a few years of service and therefore impose a modest new liability on the plan. If he must be given *retroactive* credit for service from his date of hire (before OBRA '86), the effect can easily triple or quadruple his pension and therefore triple or quadruple the funding burden on the plan. When the effect is multiplied across the universe of pension plans and the number of affected employees, the *additional* liability flowing from retroactive application might reach $1.7 billion – a liability never intended by Congress that may, ironically, lead to the reduction or elimination of pension plans.

ARGUMENT

I. SECTION 406(a) OF ERISA DOES NOT PROHIBIT AN EMPLOYER FROM RECEIVING A VALUABLE BENEFIT FROM ITS EMPLOYEES IN RETURN FOR PROVIDING BENEFITS UNDER A FUNDED EMPLOYEE BENEFIT PLAN.

Lifted from the specific factual context, the decision below rests on the proposition that it is a prohibited transaction under section 406(a) of ERISA for an employer to receive a valuable benefit from its employees as a condition to eligibility for benefits under a funded employee benefit plan. Lurking within that proposition is the corollary that an employer acts as a fiduciary in setting conditions for eligibility under employee benefit plans. As *amicus curiae*, the Chamber would like to assist the Court by making clear, not just that the propositions are untrue, but that employee benefit plans could not function if they were true.

Preliminarily, however, we must dispose of a question that some readers feel is left unclear in the decision below – whether the prohibited transaction supposedly resides in the act of including the release in the plan amendment or in the act of administering the plan in accordance with those terms. We believe the essence of the decision below, and the proper battleground in this Court, is the amendment itself, partly because that is what the decision says but more importantly because it cannot be a prohibited transaction to pay benefits to participants in accordance with the terms of the plan.

A. Paying Benefits to Participants in Accordance with the Terms of the Plan Is Not a Prohibited Transaction under Section 406(a) of ERISA.

A prohibited transaction under section 406(a) of ERISA occurs when a fiduciary causes a plan to engage in a transaction described therein with a "party in interest," unless the transaction is exempt under section 408. One such prohibited transaction – the one at issue in this case – is the "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan." Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

Parties in interest are defined in section 3(14) of ERISA, 29 U.S.C. § 1002(14), and specifically include both the employer whose employees are covered by the plan *and the employees themselves*. Since paying benefits to participants in accordance with the terms of the plan obviously constitutes a "transfer" of "assets of the plan" to a "party in interest," as well as a use of plan assets "by or for the benefit of a party in interest," payment of benefits to participants would itself be prohibited under section 406(a) but for the exemptions in section 408.

Section 408(b)(9), 29 U.S.C. § 1108(d)(9), provides the appropriate exemption: "[t]he making by a fiduciary of a distribution of the assets of the plan in accordance with

the terms of the plan . . . " While most often invoked with regard to distributions upon termination of a plan, section 408(b)(9) on its face is not limited to plan termination. It merely provides that, if the distribution is by reason of plan termination, the distribution must also satisfy the detailed rules regarding distributions upon plan termination.[1] Thus, paying benefits to participants in accordance with the terms of the plan is not a prohibited transaction under section 406(a) of ERISA.

In the present case, therefore, if there is a prohibited transaction under section 406(a) of ERISA, it must inhere in the act of conditioning eligibility for the special "window" pension on execution of a release. That is exactly what the decision below says: "The only remaining question, then, is whether *the 1990 Plan amendments* were a transaction that directly or indirectly benefitted Lockheed . . . For these reasons, we conclude that the [*sic*] Lockheed's *adoption of the 1990 Plan amendments* violated ERISA because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed." Jt.

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[1] As described in the Conference Report to ERISA:

> It is not a prohibited transaction for a plan to distribute its assets in accordance with the provisions of the plan and in the case of a pension plan if the distribution is in accord with the allocation of assets rules under the termination insurance provisions of the substitute.
>
> Also, a distribution of assets from a welfare (or pension) plan, as described above in "Basic fiduciary rules" is exempt from the labor provisions as to prohibited transactions.

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 316 (1974). To read section 408(b)(9) as limited to plan terminations would lead to the absurd conclusion that, prior to termination, all distributions to participants in accordance with the terms of the plan are prohibited transactions.

App. at 89, 91 (emphasis added).[2] Accordingly, that is the issue that we address here.

B. Employee Benefit Plans Could Not Function If an Employer Were Prohibited from Receiving a Valuable Benefit from Its Employees as a Condition to Eligibility for Benefits under an Employee Benefit Plan.

The "gratuity" theory of employee benefits was discredited long before ERISA was enacted.[3] Nowadays, there can be no doubt that employee benefits are part of the mutual exchange of value between an employer and employee. An employer offers compensation, which may be immediate cash (such as paycheck), immediate benefits (such a medical insurance), or deferred cash or benefits (such as a pension). In return, the employer receives valuable benefits from the employee:

– The benefit may be coming to work for the employer. Suppose, for example, that an employer has a pension plan with early retirement at age 60. Its competitors have pension plans with early retirement at age 55. In order to attract employees, the employer may have to amend its pension plan to provide early retirement at age 55. If so, there is no doubt that the employer enjoys a real and substantial economic benefit from amending the pension plan.

[2] Consistent with the quoted statements from the opinion, the decision below does not confront or overcome – indeed, it never mentions – ERISA section 408(b)(9), as it would have had to do if it had held that the prohibited transaction lay in carrying out the amendment, rather than making the amendment.

[3] *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. den.*, 336 U.S. 960 (1949). *See, generally, Employee Benefits Law* 249-250 (Bureau of National Affairs 1991).

– The benefit may be reducing turnover among the workforce. While younger employees may choose to work at a company with a pension plan providing modest pensions, as the employees grow older, they may desert the company for a competitor that offers a superior pension plan. The first employer may have to improve the benefits under its pension plan, and if it does so, there is no doubt that it enjoys a real and substantial economic benefit from retaining its workforce through their most productive years.

– The benefit may be fostering turnover. In the modern era where mandatory retirement on account of age is unlawful, an employer with a poor pension plan may find that its older employees choose not to retire. Without jobs being opened up for new, young employees, normal turnover is disrupted, with the result that necessary skills are not passed down to the next generation and the cost of labor increases every year as the average age of the workforce increases. The employer may very well amend its pension plan to improve retirement benefits in order to promote the orderly turnover in its workforce that is essential to long-term economic success.

– The benefit may be financial. In difficult times, the employer may not be able to afford increases in current cash compensation but may wish to reward its employees for their hard work and loyalty. Amending the pension plan to increase the benefits may provide the perfect solution: granting a valuable benefit without a corresponding current cash requirement. Indeed, if the pension plan is overfunded, there may be no current cash cost to the employer at all. In this scenario, there is no doubt that the employer enjoys a real and substantial economic benefit from amending the pension plan.

These examples lay bare a fundamental truth that the decision below overlooks: employers are not eleemosynary institutions; they provide employee benefits in order to receive a valuable benefit in return. This is neither

surprising nor disturbing in a free market economy. It means, however, that employee benefit plans could not function if an employer were prohibited from conditioning eligibility for benefits under an employee benefit plan on the employee's conferring a valuable benefit on the employer.

With that understanding, we can ratchet up the examples by introducing the concept of direct monetary benefit to the employer:

– Suppose that an employer has an overfunded pension plan. Suppose that labor costs are too high because the number of employees is too great. Suppose the employer amends the pension plan to provide dramatically improved pensions to employees who retire during a "window" period of 60 days, with no release of any kind required from the employees. Suppose that most of those eligible for retirement take early retirement under the window and enjoy the improved pensions, resulting in a direct, monetary savings to the employer in salaries. Even without a release, there can be no doubt that the expenditure of plan assets is conditioned on the employees' conferring a monetary benefit on the employer by their retirement.

– Suppose that, at the expiration of a collective bargaining agreement, the union calls a strike. Suppose that the union charges the employer with unfair labor practices during the strike. But suppose that the employer and union settle the strike, including the union's charges of unfair labor practices, by entering into a new collective bargaining agreement that calls for increases in pension benefits. And suppose that the pension plan is overfunded, so that the pension increases carry no current cost for the employer. There can be no doubt that the expenditure of plan assets is conditioned on the employees' conferring a monetary benefit on the employer by relinquishing their claims of unfair labor practices.

– For the starkest example of direct monetary benefit to the employer, suppose that an employer must reduce wage costs and therefore announces reductions in wages (or proposes wage concessions to the union, if the employees are represented). To soften the blow, the employer agrees to improve pensions. Suppose the pension plan is overfunded, so that the improvement in pensions carries no current cost to the employer. When this arrangement is finalized (through a new collective bargaining agreement, if the employees are represented), there can be no doubt that the expenditure of plan assets is conditioned on the employees' conferring a monetary benefit on the employer by reducing their wages.

We doubt that anyone would quarrel with the propriety of the employer's behavior in any of the foregoing examples, including the last three, all of which are common occurrences. But in all of those examples the amendment of the pension plan would constitute a prohibited transaction if the decision below were correct that it is prohibited for the employer to receive a valuable benefit from its employees as a condition to eligibility for benefits under an employee benefit plan. The fact that employee benefit plans simply *could not function* under the proposition adopted below strongly suggests that it is not the law.

C. By Leaving Settlor Functions Unaffected by Fiduciary Rules, ERISA Leaves Employers Free to Seek Their Own Self-interest When Determining What the Terms of Their Plans Shall Be, Including Changing or Ending Them.

It would be most remarkable if ERISA, a law designed to promote and protect employee benefits, enshrined a principle under which employee benefit plans simply could not function. Of course, it did not, because in both its language and its structure ERISA

reflects the distinction between settlor functions and fiduciary functions.

The prohibited transaction rules of section 406 of ERISA are a subspecies of the fiduciary rules of ERISA, which occupy Part 4 of Title I of ERISA (sections 401-414, 29 U.S.C. § 1101-1114). That prohibited transactions are limited to the world of fiduciary responsibility is reflected on the face of section 406 itself, which begins with the phrase, "A *fiduciary* with respect to a plan shall not *cause the plan to engage in a transaction*, if he knows or should know that such transaction constitutes a direct or indirect . . . " ERISA section 406, 29 U.S.C. § 1106 (emphasis added). Absent fiduciary activity, the prohibited transaction rules of section 406 simply do not apply.[4]

Fiduciary activity is defined in ERISA section 3(21), 29 U.S.C. § 1002(21), by reference to functions. What is striking about that definition is that all of the functions described there relate to the administration of the plan and its assets *once its terms have been established by the settlor*. None of the functions that give rise to fiduciary responsibility relate to setting the eligibility conditions under the plan, changing the eligibility conditions, or deciding to end the plan – the traditional settlor function.

The ERISA definition of fiduciary therefore implicitly reflects the traditional distinction in common law between settlor functions and fiduciary functions. Under

[4] In addition, in this case, there is no "transaction," because the employer gives nothing to the plan and receives nothing from the plan. That fact distinguishes this case from *Commissioner v. Keystone Consolidated Industries, Inc.*, 113 S. Ct. 2006 (1993), in which the transaction consisted of the employer's contributing property to a plan in satisfaction of the funding requirement of law and this Court concluded that the transaction was a prohibited "sale or exchange" between the plan and a disqualified person under section 4975 of the Internal Revenue Code of 1986.

the common law of trusts, in establishing the terms of the trust, the settlor acts free from any fiduciary responsibility: "The settlor in creating a trust can make such provisions with respect to . . . the rights of the beneficiaries as he may deem wise; if the provisions do not run counter to any rule or policy of the law they are valid and enforceable." I W. Fratcher, *Scott on Trusts* §§ 3-4 at 51-53 (4th ed. 1989). Further, a settlor who reserves the right to amend the trust has unfettered discretion to do so, including "changing the beneficiaries, or cutting down or increasing the extent of the interests of the beneficiaries," free from any fiduciary responsibility. *Id.*, § 331 at 378-381. Similarly, the settlor may revoke a trust, free from fiduciary responsibility. *Id.*, § 330 at 344-345.

The analog in employee benefits to the settlor function in the common law of trusts is setting up the conditions of eligibility for benefits under an employee benefit plan and establishing the amount of benefits. That includes not only the original design of the plan but also decisions about amending the plan and the decision to terminate the plan altogether, termination being the ultimate restriction of eligibility for benefits. As a result, the act of amending a plan to set (or change) the conditions of eligibility for benefits is a settlor function, not a fiduciary function, and is therefore off limits from the prohibited transaction rules and all other fiduciary rules.[5]

[5] It is unnecessary in this case to make the more sweeping assertion that *all* amendments represent an exercise of the settlor function. In this case, Lockheed's amendment did no more than set up the conditions of eligibility for an additional new benefit under the plan (the enhanced "window" early retirement benefit). We leave for another day the question of whether an amendment that went beyond the traditional settlor function and purported to invade the traditional trustee function would likewise be exempt from the fiduciary rules.

The distinction between settlor and fiduciary functions is critical, not just to the prohibited transaction rules, but to all of the fiduciary responsibility rules. For example, another rule of fiduciary responsibility obligates a fiduciary to eschew any self-interest and, instead, to act exclusively in the interest of the participants in the plan – generally referred to as the "exclusive benefit" rule. ERISA section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Needless to say, the settlor function could not be performed if it were subject to the exclusive benefit rule, because an employer almost always acts in its own self-interest (and properly so) in determining who is eligible for benefits, under what conditions, and how much they receive. Yet the decision below necessarily includes the corollary that Lockheed was acting as a fiduciary in adopting the amendment in question and so – even apart from the prohibited transaction rules – it would declare open season under the exclusive benefit rule on virtually all amendments to funded employee benefit plans.[6]

Though the settlor function is not susceptible of regulation by the fiduciary rules, however, Congress did not lack the ability to regulate the settlor function; it merely had to choose a different structure. Harking back to the common law rule that even a settlor cannot set up terms that "run counter to any rule or policy of the law" (*Scott on Trusts*, *supra*, at 53), Congress regulated the settlor function by establishing substantive minimum standards

[6] The analysis of the court of appeals applies to all employee benefit plans covered by ERISA that have assets, that is, almost all pension plans and some welfare plans. According to the U. S. Department of Labor, there were 730,106 pension plans alone covered by ERISA in 1988. *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 602.

for employee benefit plans, which appear in Part 2 of Title I (and, with regard to plan termination, in Title IV).

For example, section 202, 29 U.S.C. § 1052, generally does not permit an employer to set up a minimum age requirement for participation in a pension plan that is higher than age 21 or a minimum period of service with the employer of more than one year. Section 203, 29 U.S.C. § 1053, generally does not permit an employer to impose a requirement that an employee work for the employer for more than five years before becoming vested in his or her pension. Section 204, 29 U.S.C. § 1054, generally does not permit an employer to amend a pension plan where the effect would be to reduce the accrued benefit of a participant. All the rest of Part 2 of Title I follows the same pattern.

From the language and structure of ERISA, therefore, two conclusions emerge. The discretion of the settlor in setting up the terms of a plan is regulated by substantive minimum standards that are distinct from the rules of fiduciary responsibility. But within the boundaries established by the minimum standards, ERISA does not fetter the settlor's discretion in deciding who shall be entitled to benefits and under what conditions.

This line of demarcation between settlor and fiduciary functions is completely consonant with the over-all purpose of ERISA, not to define the employer's promise, but instead to assure that the employer keeps whatever promise it makes. Within the boundaries of the substantive minimum standards, ERISA does not seek to dictate the employer's promise; it seeks only to assure that the promise is definite (in a written plan document), is disclosed to participants (through the plan document and summary plan description), is funded or insured by assets outside the reach of the employer (through the trust and funding rules), and in the event of termination is fulfilled by plan assets, by additional payments from the employer, or, where applicable, by the Pension Benefit

Guaranty Corporation (in the plan termination provisions).[7]

The result in this case is that Lockheed's decision to establish a release as a condition under its pension plan to eligibility for an additional new benefit is a settlor decision not subject to attack under the fiduciary rules (whether the prohibited transaction rules, the exclusive benefit rule, or any other fiduciary rules). It is tested only against the substantive minimum standards of ERISA, which do not (and could not reasonably) prohibit an amendment merely because, in return, the employer receives a substantial benefit – even a monetary benefit – from the employee.

D. Blurring the Line Between Settlor and Fiduciary Functions Inevitably Destroys the Bright Line Test for Prohibited Transactions, Creating Intolerable Uncertainty for Employers and Administrators and Forcing the Federal Courts to Review Plan Amendments One by One for Validity.

It is possible to conjure up hypotheticals that, viewed in isolation, put the demarcation between settlor and

[7] Both the Internal Revenue Service and the Department of Labor have repeatedly recognized that, as long as the plan does not slip below the substantive minimum standards of ERISA, the employer is free to seek its self-interest in establishing the terms of the plan. For example, to the extent that a pension plan vests a participant faster than ERISA requires, it may take away that vested benefit for any reason, such as leaving the employer to engage in competitive employment. 26 C.F.R. § 1.411(a)-4(a) and (c) (Example 1). For another example, ERISA protects payment of the "normal retirement benefit" at "normal retirement age," but any benefit *greater* than the normal retirement benefit or payable *before* normal retirement age can be taken away for any reason that the employer chooses to put in the plan. 29 C.F.R. § 2530.203-3(a).

fiduciary functions to a severe test. One reaction is to decide that the demarcation is not absolute – that the settlor function can sometimes be subject to fiduciary responsibility, such as the prohibited transaction rules. That reaction is a serious mistake under ERISA, given the unusual structure of the prohibited transaction rules.

The prohibited transaction rules of ERISA are unusual in that they are absolute. Under section 406 of ERISA, a transaction is prohibited merely because the transaction is with a "party in interest," such as the employer. "Party in interest" is defined in explicit detail in section 3(14) of ERISA, 29 U.S.C. § 1002(14). *No other considerations apply*. Congress deliberately made the prohibition absolute, without regard to the motives of the fiduciary or the effect on the participants in the plan or any other consideration whatsoever, so as to create a bright line, as this Court noted in *Commissioner v. Keystone Consolidated Industries, Inc.*, 113 S. Ct. 2006 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan.")

Congress understood very well that a flat prohibition, removing any element of judgment, would bar not only abusive transactions but also some innocuous transactions.[8] It decided, however, that the advantage of a bright line outweighed any disadvantage. The advantage, of course, was better enforcement through letting sponsors and administrators of plans know in advance what was impermissible (without exposing themselves to personal liability through trial and error) and removing the need for decades of judgment calls in the federal courts to refine the rules.[9]

[8] *See, e.g.*, H.R. Rep. 93-1280, 93d Cong., 2d Sess. 310 (1974).

[9] *See, e.g.*, S. Rep. No. 93-383, 93d Cong., 2d Sess. 95 (1973).

If the demarcation between settlor and fiduciary functions is blurred, however, the bright line of the prohibited transaction rules cannot be maintained. This is the corner into which the court of appeals painted itself in this case. Implicitly recognizing that the prohibited transaction rules of ERISA *as written* would prohibit virtually all amendments to pension plans (under its theory), the decision below obliterates the absolute prohibition established by Congress and substitutes a judgment of degree: an amendment is prohibited if the benefit to the employer is more than "incidental" but not if the benefit is merely "incidental."

Any approach that does not strictly maintain the demarcation between settlor and fiduciary functions is forced to do the same: ignore the simple on-off toggle switch enacted by Congress in section 406(a) and start drawing lines and weighing factors. But substituting a judgment of degree for a bright line test would immediately cast the employee benefits community into the very pickle that Congress sought to avoid by providing a clear and definite standard not involving judgment. The serious negative effects would be felt by employers, administrators and the federal courts alike.

From the employer's point of view, if plan amendments really were subject to the fiduciary rules of ERISA and a prohibited transaction were a judgment of degree, an employer would hesitate to amend its pension plan, even to raise benefits – a result clearly at odds with the intent of Congress in ERISA to encourage pension plans to provide retirement security for employees. The only safe course for the employer would be to freeze or terminate the existing plan and start a new plan that embodied the desired plan amendment.[10] But it cannot have been

[10] Respondent and his *amici* in the court below agreed that the act of creating a new plan cannot involve a prohibited

the intent of Congress to force upon employers such an unnecessary and wasteful exercise as freezing the existing plan (and then running the frozen plan and the new plan simultaneously), or else terminating the existing plan, just to make an amendment.[11]

The administrator of the plan has a different point of view. As a fiduciary, the plan administrator has a duty not to give effect to plan amendments that constitute prohibited transactions. ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). As written, the prohibited transaction rules are capable of relatively easy application by a plan administrator with no judgment of degree, simply by asking, Is the other party to the transaction a "party in interest"? But if prohibited transactions were a question of degree, the plan administrator would be uncertain whether any particular amendment benefits the employer to the degree where it becomes prohibited, and the plan administrator would be ill equipped to make the necessary investigation and judgment.

This would be all the more true where the plan is administered by an independent third party known as a

transaction, even on their theory that amending a plan involves the fiduciary rules of ERISA, because a new plan has no assets until after it is established. Thus, they agreed that a new plan could have the very feature that, if added to an existing plan, would constitute a *per se* prohibited transaction under ERISA. Common sense rebels at this bizarre dichotomy, which finds no basis in ERISA, but if it is the law, employers will be forced to make use of it, as described in the text.

[11] Since ERISA does not require welfare plans to be funded at all, those employers which have chosen to enhance the security of the benefits by funding them would find that they are hamstrung by the decision below, whereas there would be no problem if the plan were unfunded. Ironically, therefore, the decision below, which pays lip service to increasing the security of employees in their benefits, would exert irresistible pressure on employers to abandon funding of their welfare plans.

"third-party administrator." A third-party administrator's expertise is in day-to-day administration of plans; typically, the third-party administrator has little knowledge of the employer's business. It would be fanciful to expect third-party administrators to judge whether plan amendments benefit the employer more than "incidentally" (or according to any other formulation involving judgment) and therefore are void as prohibited transactions.

Moreover, the plan administrator would face personal liability under ERISA for deciding that question wrong. If the plan administrator implemented a plan amendment, for example, and it were later determined that the amendment was void as a prohibited transaction under ERISA, the plan administrator could be personally liable to make the plan whole for all benefits paid under that amendment. ERISA section 409, 29 U.S.C. § 1109. There is no indication in ERISA that Congress intended to put plan administrators in such an untenable position and there is no policy reason for doing so.

From the perspective of the federal judiciary, the news is even worse. In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only sensible course for plan administrators, as fiduciaries, will be to apply to a federal district court for instructions as to whether particular amendments are lawful or, instead, are prohibited transactions. This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989). Even if the administrator does not seek declaratory judgment, any participant in the plan may sue in federal court to overturn the amendment on the ground that it is a prohibited transaction, thus forcing the federal courts into the business of examining amendments individually

to determine whether the benefit to the employer is "incidental" or not.[12]

Needless to say, enmeshing the federal courts in analyzing the degree of benefit to an employer from individual amendments to employee benefit plans represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

This case presents a picture strikingly similar to what the Court saw last term in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995). In *Curtiss-Wright*, a plaintiff dissatisfied with the employer's legal authority to amend a plan concocted a new theory that the standard language in plans, reserving to employers the authority to amend the plan, is legally insufficient under ERISA, thus casting doubt on the validity of nearly all plan amendments adopted since ERISA and creating an entire new class of ERISA litigation as participants and plan administrators litigate the validity of individual plan amendments.

The shock wave in *Curtiss-Wright* was shaped a little differently from this case. *Curtiss-Wright* applied to both pension and welfare plans but had mainly retroactive

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[12] The argument that Lockheed's amendment was a prohibited transaction was made most eloquently in the court of appeals, not by Mr. Spink, but by Mr. Spink's *amicus curiae*, the International Union of Petroleum and Industrial Workers, whose brief was devoted entirely to this issue. No doubt employees everywhere are salivating at the thought that amendments are prohibited if the employer derives any substantial benefit from them, a rule that would permit employees to defeat at will almost any amendment to an employee benefit plan and would spark a renaissance of ERISA litigation that would make the retiree insurance explosion of the past decade look puny by comparison.

effect. (Prospectively, an employer could solve the *Curtiss-Wright* problem by modifying the amendment language in the plan.) This case applies mainly to pension plans but has both retroactive and *unlimited prospective* effect. Here, the source of the problem is not plan language, which the employer can modify, but section 406(a) of ERISA, which will continue to apply to (and call into question) future pension plan amendments, if the decision below stands.

Over-all, the destructive force of the decision below on employers, plans and the federal judiciary is comparable to the court of appeals decision in *Curtiss-Wright*, particularly because of the open-ended prospective effect. In *Curtiss-Wright*, the Chamber urged the Court, in unusually strong terms, to reverse the decision, and it did so. We respectfully urge the same in this case as to the first question presented.

II. BY GIVING RETROACTIVE EFFECT TO OBRA '86, THE DECISION BELOW FLOUTS THE EXPRESS INTENT OF CONGRESS AND WOULD VASTLY MULTIPLY THE FINANCIAL BURDENS BEYOND WHAT CONGRESS INTENDED.

The decision below gives retroactive effect to statutory provisions as to which Congress clearly expressed its intention that application be prospective only, thus bringing the decision below into conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). Since Mr. Spink has steadfastly denied the retroactive nature of his claim (and of the decision below), the Chamber would like to underline the retroactivity, which is clear when the technical issue is put into a larger historical context. We will then content ourselves with the demonstration in the brief of Lockheed that Congress intended the applicable provision to operate prospectively only. But we will illuminate for the Court the

serious practical consequences of applying it retroactively, since retroactive application brings into play a dangerous "multiplier" effect.

A. The Decision below Gives Retroactive Application to the Requirement of OBRA '86 That Older Employees Be Permitted to Participate in Pension Plans.

The retroactive effect of the decision below is clear when it is understood how benefits accrue under a defined benefit pension plan. With a few exceptions not relevant here, benefits accrue ratably over the period that the employee participates in the plan. For example, a typical pension plan might provide a monthly benefit at retirement of $50 multiplied by the number of years that the employee has participated in the plan. If an employee works 30 years and retires, his monthly pension is $1,500. In this example, the employee's pension has accrued ratably over 30 years, at a rate of $50 per year. This methodology is not only logical and fair; it is the law. ERISA section 204(b)(1), 29 U.S.C. § 1054(b)(1).

Since length of participation in the plan determines the amount of pension, ERISA closely regulates the matter of when employees begin participation in pension plans. ERISA section 202, 29 U.S.C. § 1052. Among the original participation rules, ERISA expressly permitted a plan to exclude from participation employees who were hired less than five years before normal retirement age. (Since normal retirement age is typically 65, this permitted the typical plan to exclude employees hired after age 60.)

ERISA permitted this exclusion of employees hired after age 60 for a very specific reason. Pensions are generally funded over the working life of the employee. For most employees, that means a period of decades, which

permits the plan to accumulate the necessary assets gradually over many years. On the other hand, if an employee could join a plan and retire just one or two years later, it would impose a large, unexpected liability on the plan, which the plan would be unable to finance over a long working life. In view of the cost, Congress permitted plans to exclude such employees altogether.[13]

In accordance with ERISA, the Lockheed plan, like many others, lawfully excluded from participation employees who were hired within 5 years before normal retirement age. As a result, when Mr. Spink was hired in this case in 1979 at age 61, he was lawfully excluded from the pension plan. Since he did not participate, he did not accrue any benefit under the plan.

In 1986, Congress changed ERISA so that pension plans could no longer exclude employees from participation merely because they were hired after a certain age. Omnibus Budget Reconciliation Act of 1986 ("OBRA '86"), section 9203(a), 100 Stat. 1979 (1986). Congress said that the change in the law applied "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date." OBRA '86, section 9204(b), 100 Stat. 1980 (1986). It is difficult to imagine a clearer specification of prospective effect.

Accordingly, when OBRA '86 took effect with respect to the Lockheed pension plan in 1988, Mr. Spink became entitled to participate in the Lockheed pension plan, but "only with respect to service performed on or after such date." The plan was duly amended to provide that Mr. Spink was permitted to participate on the OBRA '86 effective date, and he did in fact begin to participate in the plan in 1988. Since the amount of benefit depends on

[13] *See, e.g.*, H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 262 (1974), and H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 46 (1974).

the length of participation in the plan, Mr. Spink's benefit was thereafter calculated by reference to the length of his actual participation in the plan, that is, from and after the effective date of OBRA '86 in 1988.

What Mr. Spink sought, and the court of appeals granted him, was additional credit for the period from his hiring to the effective date of OBRA '86 – from 1979 to 1988. It is a historical fact that Mr. Spink was excluded from the plan during those years – that is, he did not in fact participate in the plan – and no one challenges the legal conclusion that such treatment was lawful when it occurred. By holding that OBRA '86 requires that credit be granted for that period, the decision below effectively makes unlawful today an exclusion that was lawful when it occurred, and therein lies the retroactivity. The decision below treats Mr. Spink the same as if OBRA '86 had been the law ever since ERISA was passed.

B. Congress Plainly Stated Its Intent That this Provision of OBRA '86 Apply Prospectively Only.

On this point, we subscribe to the discussion in the brief of Lockheed and we will not burden the Court with a duplicative demonstration of the obvious intent of Congress, plainly stated in the statute, that this change in ERISA apply prospectively only. How much more clearly could Congress state its intent than to say that the change applies "only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date"? OBRA '86, section 9204(b), 100 Stat. 1980 (1986).

But we would like to continue our discussion of how benefits accrue in defined benefit pension plans, because an understanding of that process demonstrates the error of the rationale given in the decision below. The rationale

of the decision below is that, unless Mr. Spink is permitted retroactive benefit accrual back to his original date of hire, he will suffer a reduction in the rate of his benefit accrual, in violation of a different section of OBRA '86.

But the decision below fails to appreciate the nature and significance of OBRA's prohibition on reduction in the rate of benefit accrual. Having assured all employees of the right to participate in a pension plan regardless of old age, Congress realized that the right to participate would be worthless if a plan could cut off accrual of benefits after a certain age. (This phenomenon was well-known when the upper age limit under the Age Discrimination in Employment Act was 65 but became controversial after the 1978 amendments raised the age limit to 70.)

To give meaning to the new rule that older employees must be permitted to participate, Congress had to prohibit cessation of accrual of benefits by reason of age. It did so in section 9201 of OBRA '86. Furthermore, anticipating that an unscrupulous employer might avoid that prohibition by merely reducing the rate of accrual (rather than cutting it off entirely), Congress added that the same prohibition applied not only to "the cessation of an employee's benefit accrual" but also to "the reduction of the rate of an employee's benefit accrual" because of age. OBRA '86, section 9201, amending section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(i)(1).

A cessation or reduction in the rate of benefit accrual is easy to picture. If a pension plan promises a monthly pension of $50 multiplied by the number of years that the employee has participated in the plan, employees in that plan accrue pension benefits at a rate of $50 per year of participation. After OBRA '86, it would be unlawful for that plan to provide that no further benefits accrue after age 65. It would be equally unlawful for the plan to provide that the rate of accrual is reduced to $10 for years of participation occurring after age 65.

OBRA's prohibition on plan provisions reducing the rate of accrual by reason of age has no application to Mr. Spink. Under the Lockheed plan, the rate of accrual does not change merely because the participant reaches any age. Mr. Spink's rate of accrual was the same at all times and, furthermore, the same as all other participants in the plan, both under and over age 65. Since the plan does not provide any reduction in rate, and Mr. Spink did not suffer any reduction in rate, the OBRA '86 ban on plan provisions reducing the rate of accrual by reason of age clearly has no application to this case and certainly cannot be used to justify retroactive application of the rule that older employees be permitted to participate from and after 1988.

C. Retroactive Application of OBRA '86 Would Vastly Multiply the Financial Burdens on Plans Beyond What Congress Intended.

The effect of the decision below on pension plans is immediate and severe. Even *prospective* application of OBRA '86 creates a new financial burden on plans by requiring that employees hired after age 60 be permitted to participate prospectively (reversing the original rule of ERISA that such employees could be excluded because of the cost). Retroactivity would dramatically compound the burden: not only must pension plans accept the older employee as a participant and fund his pension over a short period of time, under the decision below the pension must be inflated by taking into account the prior period when the employee did not in fact participate.

For example, suppose that an employee was hired in 1983 at age 60 and was excluded from the pension plan. In 1988, OBRA '86 takes effect and he joins the plan. In two more years, he retires. Applying OBRA '86 prospectively, he has two years of participation. Applying OBRA '86 retroactively (in accordance with the decision below),

he has seven years of participation. That means he receives more than triple the benefit, and the financial burden on the plan is more than three times greater, than if OBRA '86 were applied prospectively.[14]

The absolute dollars associated with this multiplier effect are very substantial. Using the same example, the monthly pension of our sample employee at retirement would be $100 if OBRA '86 were applied prospectively (2 years of participation at an accrual rate of $50 per year) versus $350 if OBRA '86 were applied retroactively (7 years at $50). Using the rates promulgated by the Pension Benefit Guaranty Corporation for valuing annuities, the value of a $100 monthly pension was $9,225 in 1988 and of a $350 monthly pension was $32,287. The difference – $23,062 – would have been the increase in cost to the plan in 1988, for just this one employee, if OBRA '86 had been applied retroactively. Today, eight years after OBRA '86 took effect, the cost of retroactive application is $53,433 – considerably more than double that amount.

While we are not aware of data showing exactly how many employees would be affected by retroactive application of OBRA '86 nationwide, the order of magnitude certainly can be estimated. According to the U. S. Department of Labor, in 1988 there were 32,166,000 participants in private, single-employer, defined benefit pension plans.[15] Multiply that by 37 percent to estimate the number of participants in plans that took advantage of the original ERISA provision permitting exclusion of

[14] This is a modest example. The multiplier effect is even greater in the case of Mr. Spink himself, who had approximately 9 years of service before the OBRA '86 effective date and only a year and a half afterward, yielding a multiplication factor of more than seven.

[15] *Trends in Pensions 1992*, U. S. Department of Labor, Pension and Welfare Benefits Administration 603.

employees hired after age 60.[16] Multiply that by the ratio of affected individuals to total participants, using the Lockheed plan as an example, and the estimate would be over 32,000 individuals affected nationwide.

If the cost of retroactive application of OBRA '86 for a typical participant were $53,433 today, the total cost nationwide could therefore be as high as $1.7 billion today. Even if the actual cost were half the estimate, it could still be fairly characterized as very substantial – certainly substantial enough that Congress should not be found to have imposed it on the nation's pension plans absent a clear intent to do so, in accordance with *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

As to the second question presented, therefore, the decision below not only commits error but does so in a way that dramatically multiplies the liability, resulting in a financial burden on plans far greater than Congress could ever have envisioned from the prospective application that it clearly set forth in OBRA '86. The decision below should be reversed.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the reduction or elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA

[16] This percentage is derived from a published survey of the largest salaried pension plans of 50 of the largest manufacturing companies in the United States in 1988. *Top 50 – A Survey of Retirement, Thrift, And Profit Sharing Plans Covering Salaried Employees of 50 Large U. S. Industrial Companies as of January 1, 1988*, The Wyatt Company (1988).

against those who would upset it by imposing additional burdens on employers and plans, and the time has come to do so again.

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(12)

No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,
v.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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22 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. THE DECISION REACHED BY THE NINTH CIRCUIT, THAT THE OBRA AMENDMENTS APPLY RETROACTIVELY, IS NOT AUTHORIZED BY THE LANGUAGE OF THE AMENDMENTS, IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *LANDGRAF v. USI FILM PRODUCTS*, AND CONTRAVENES THE LEGISLATIVE HISTORY OF THE AMENDMENTS	8
A. OBRA Amended ADEA and ERISA to Require Pension Accrual for Employees Working Beyond Normal Retirement Age Only for Plan Years Beginning On or After January 1, 1988	8
B. The Legislative History of the OBRA Amendments Makes Clear that the Legislation Does Not Apply to Years Prior to 1988	9
C. Retroactive Application of the OBRA Amendments Would Be Manifestly Unjust	10
II. IF AFFIRMED, THE NINTH CIRCUIT'S DECISION WILL HAMPER THE USE OF EARLY RETIREMENT INCENTIVE PROGRAMS AND RELEASES CONTRARY TO THE INTENT OF CONGRESS	12

TABLE OF CONTENTS—Continued

	Page
A. The Older Workers Benefit Protection Act Expressly Recognizes that an Employer May Obtain a Release or Waiver in Connection with an Exit Incentive or Other Employment Termination Program	12
B. Employers May Cease to Offer Enhanced Benefits to Employees at All if They Are Denied the Ability to Obtain Releases	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES

	Page
Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)	10, 11, 12
Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board, 359 N.E.2d 393 (N.Y. 1976)	3
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	4
EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984)	4
EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3d Cir.), *vacated and remanded*, 493 U.S. 801 (1989), *on remand*, 907 F.2d 1354 (3d Cir. 1990)	4
Florida v. Long, 487 U.S. 223 (1988)	11
Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992)	4
General Motors Corp. v. Wells, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, 495 U.S. 923 (1990)	3
Harris v. Forklift Systems, 114 S. Ct. 367 (1993)	4
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	4
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)	3
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	4
Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994)	3, 7, 8
Nolan v. Otis Elevator Co., 505 A.2d 580 (N.J. 1986)	3
O'Shea v. Commercial Credit Corp., 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991)	4
Philadelphia Electric Co. v. Fischer, *cert. denied*, 114 S. Ct. 622 (1993)	3
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989)	4, 13
Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983)	3

TABLE OF AUTHORITIES—Continued

DOCKETED CASES — Page

O'Connor v. Consolidated Coin Caterers Corp., No. 95-354 (Jan. 31, 1996) 4
Raczak v. Ameritech, No. 95-1082 (6th Cir. Apr. 1995) 4

STATUTES

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* 2, 5
Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* 2, 5
29 U.S.C. § 1003 12
29 U.S.C. § 1106(a)(1)(D) 6
Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.* 5, 6
Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990) 12, 13
Pub. L. No. 101-433, § 201, 104 Stat. at 983 ..... 13, 14
Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (1986) 5
Pub. L. No. 99-509, §§ 9201-04, 100 Stat. at 1973-80 2
Pub. L. No. 99-509, § 9204(a), 100 Stat. at 1979 8

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 382 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4027 9
136 Cong. Rec. S13,596 (daily ed. Sept. 24, 1990) 14, 15
136 Cong. Rec. S13,603 (daily ed. Sept. 24, 1990) 15

MISCELLANEOUS

Federal Rule of Civil Procedure 12(b)(6) 6
57 Fed. Reg. 10,626 (1992) 15

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---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. This brief urges reversal of the decision below and thus supports the position of the petitioners.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of under-

standing of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are employers subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.* As employers, virtually all of EEAC's members maintain employee benefit plans and offer early retirement incentive programs. These plans are either adopted at the employer's option or are products of collective bargaining with employee representatives.

As potential defendants to lawsuits under ERISA and the ADEA, EEAC's members are interested in the issues presented in this case; i.e., whether the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, §§ 9201-04, 100 Stat. 1874, 1973-80 (1986) (OBRA), has retroactive application and whether an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program.

The issues presented in this case are extremely important to EEAC's constituency. The Ninth Circuit held that the OBRA amendments apply retroactively. Thus, the court ruled that the OBRA amendments require employers not only to permit employees hired within five years of normal retirement age to participate in pension plans for plan years beginning in 1988, but to retroactively include pre-enactment

service years in calculating accrued benefits. The Ninth Circuit also held that Lockheed violated ERISA by requiring a release of claims as a precondition to participation in an enhanced benefits early retirement program. If either of these rulings are allowed to stand, there will be a susbtantial adverse impact upon employers who maintain employee benefit plans and upon employees who routinely receive enhanced benefit packages in exchange for releasing their employers from potential litigation claims.

The Ninth Circuit's decision that the OBRA amendments have retroactive application is not authorized by the language of the amendments, is in direct conflict with this Court's recent decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), and contravenes the legislative history of the amendments. Moreover, if allowed to stand, the Ninth Circuit's decision will hamper the ability of employers to offer early retirement incentives.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed briefs as *amicus curiae* in cases before this Court, the United States circuit courts of appeals and various state supreme courts, including the *Landgraf* retroactivity case cited above. As part of this *amicus* activity, EEAC has participated in numerous cases before the courts of appeals involving ERISA.[1] Furthermore, a

[1] *Philadelphia Electric Co. v. Fischer, cert. denied*, 114 S. Ct. 622 (1993); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *General Motors Corp. v. Wells*, 881 F.2d 166 (5th Cir. 1989) *cert. denied*, 495 U.S. 923 (1990); *Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*, 359 N.E.2d 393 (N.Y. 1976).

number of other cases in which EEAC has participated have involved ADEA.[2] In addition, EEAC has briefed a number of other employment issues in this Court.[3]

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case, particularly the practical effect that the decision will have on employers and potential beneficiaries of early retirement benefit plans.

STATEMENT OF THE CASE

Underlying Facts. Respondent, Paul L. Spink, worked for Petitioners, Lockheed Corporation, *et al.* (Lockheed) between 1939 and 1950. (Pet. App. at 2a.) Mr. Spink was rehired by Lockheed in May 1979 at the age of 61. *Id.* At the time Mr. Spink was

[2] *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989); *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir.), *vacated and remanded*, 493 U.S. 801 (1989), *on remand* 907 F.2d 1354 (3d Cir. 1990); *Raczak v. Ameritech*, No. 95-1082 (6th Cir. Apr. 1995); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

[3] *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354 (Jan. 31, 1996); *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

rehired, the terms of Lockheed's retirement plan (the Plan) excluded him from participating because he was over sixty years of age. *Id.* at 2a-3a.

In 1986, Congress passed the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (1986). *Id.* at 3a. OBRA amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age discrimination in participation and benefit accrual standards applied by employee benefit plans. *Id.* The OBRA amendments were effective for plan years beginning after January 1, 1988. *Id.*

Pursuant to the OBRA amendments, Lockheed allowed employees hired after age sixty to participate in the Plan after January 1, 1988. *Id.* Mr. Spink became a participant on the first day of the Plan's 1988 plan year. *Id.* at 3a-4a. Lockheed did not credit Mr. Spink with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. *Id.* at 4a.

In 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO). *Id.* The SRO offered increased retirement benefits to eligible employees as an incentive to terminate their employment. *Id.* The increased benefits were paid out of the Plan's surplus assets. *Id.* In order to partake in the SRO, all Lockheed employees were required to sign a waiver releasing Lockheed from any potential employment related claims they might have against the company. *Id.* Mr. Spink did not elect to

partake in the SRO. *Id.* Mr. Spink retired from Lockheed in June 1990. *Id.*

On February 5, 1992, Mr. Spink filed a complaint in the United States District Court for the Central District of California. *Id.* In his complaint, Mr. Spink challenged the release requirement of the SRO and alleged that the OBRA amendments to ERISA and ADEA entitled him and similarly situated employees to benefits under the Plan calculated on the basis of periods worked before and after January 1, 1988, the effective date of the statute. *Id.*

The district court's decision. Lockheed moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* at 5a. The district court granted Lockheed's motion and dismissed the complaint with prejudice. *Id.*

The Ninth Circuit's decision. The Ninth Circuit reversed the decision of the district court. First, the Ninth Circuit held that the OBRA amendments applied retroactively. *Id.* at 8a n.1. The Ninth Circuit also held that by amending the Plan to require a release as a condition of receiving additional benefits to which the participant would not otherwise be entitled, Lockheed engaged in a prohibited transaction under Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D). *Id.* at 14a. A petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is erroneous for two distinct reasons. First, by holding that the OBRA amendments apply retroactively, the Ninth Circuit has acted in contravention of the language of the statute and has ignored the legislative history of the OBRA amendments. Moreover, the Ninth Circuit's holding is in direct conflict with this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

Second, the holding that Lockheed violated ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims completely disregarded the edict of the Older Workers Benefit Protection Act which expressly recognizes that an employer may obtain a release or waiver in connection with an exit incentive or other employment termination program. If the Ninth Circuit's decision is not overturned, employers may cease offering enhanced severance benefits to their employees at all. Employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

ARGUMENT

I. THE DECISION REACHED BY THE NINTH CIRCUIT, THAT THE OBRA AMENDMENTS APPLY RETROACTIVELY, IS NOT AUTHORIZED BY THE LANGUAGE OF THE AMENDMENTS, IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *LANDGRAF v. USI FILM PRODUCTS*, AND CONTRAVENES THE LEGISLATIVE HISTORY OF THE AMENDMENTS

A. OBRA Amended ADEA and ERISA to Require Pension Accrual for Employees Working Beyond Normal Retirement Age Only for Plan Years Beginning On or After January 1, 1988

The language of the 1986 OBRA amendments supports the conclusion that they should not be applied retroactively. Section 9201 of OBRA amended ADEA by adding Section 4(i) which requires pension accrual for employees working beyond normal retirement age for plan years beginning on or after January 1, 1988. Section 9202 of OBRA amended ERISA in an identical manner by amending Section 204.

The language of the OBRA amendments expressly states that the amendments apply prospectively. Section 9204(a) provides that the OBRA amendments apply "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." § 9204(a), 100 Stat. at 1979. Thus, on its face, the statute does not apply to plan years prior to 1988.

In *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), this Court confirmed that statutes are presumed to apply prospectively "absent clear congressional intent" favoring retroactivity. *Id.* at 1505. Given the absence of clear congressional intent to apply the 1986 amendments retroactively, and statutory language specifically stating that years previous to 1988 are outside the reach of the Act, years prior to 1988 must be exempt from pension accrual.

B. The Legislative History of the OBRA Amendments Makes Clear that the Legislation Does Not Apply to Years Prior to 1988

The legislative history of OBRA substantiates that Congress did not intend the amendments to apply retroactively. With respect to the impact of the OBRA amendments on ADEA, House Conference Report No. 99-1012 provides:

> It is the intention of the conferees, in adopting the amendments to ADEA (new § 4(i)), that the requirements contained in § 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan (as defined in section 3(2) of ERISA) shall constitute the *entire extent* to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions (as described in the provision). No inference is to be drawn by the addition of section 4(i) as to whether or to what extent employee benefit plans might have been required to provided benefit accruals or allocations to employees' accounts for employees protected under ADEA prior to the effective date of section 4(i).

H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 382 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4027. This language is the antithesis of an intent to apply OBRA retroactively. Moreover, with respect to the effective date of the OBRA amendments, House Conference Report No. 99-1012 provides, "The conference agreement clarifies that the amendments apply

to plan years beginning on or after January 1, 1988." *Id.*

Each of these statements confirm that Congress did not intend the OBRA amendments to have retroactive application. By stating no view on pension accrual or allocations "prior to the effective date of section 4(i)," and then explicitly making the effective date of the statute January 1, 1988, the House Conference Report substantiates that the OBRA amendments do not apply to plan years before 1988.

C. Retroactive Application of the OBRA Amendments Would Be Manifestly Unjust

In addition to the compelling reasons set forth above—retroactive application of the OBRA amendments is not authorized by the language of the statute, is in direct conflict with this Court's decision in *Ladgraf*, and contravenes the legislative history of the OBRA amendments—common sense dictates reversal of the Ninth Circuit's decision. Specifically, retroactive application of the OBRA amendments would impose burdensome and inequitable results on employers.

In *Arizona Governing Committee v. Norris*, where the Supreme Court considered the constitutionality of Arizona's voluntary pension plan, this Court ruled that the plan violated Title VII, yet refused to approve an award of retroactive relief. 463 U.S. 1073 at 1106 (1983). The Court declined to impose retroactive relief on the grounds that such relief "would be both unprecedented and manifestly unjust." *Id.*

By rejecting the notion of retroactive relief under these circumstances, the Court correctly acknowledged that "a retroactive remedy would have had a

potentially disruptive impact on the operation of the employer's pension plan." *Id.* at 1106-07. Pension plans are not self funding. Rather, funding is based upon expected long-term payouts to plan participants. Unbudgeted pension payments must be made up from the employer's general revenues or from the assets of the pension plan itself. Unfunded liability will have a tremendous economic impact on pension plans. Retroactive pension costs would have to be funded out of revenues beyond those expected when plan contributions were made.

The City of New York—in a brief filed jointly with EEAC in *Florida v. Long*, 487 U.S. 223 (1988)—indicated that additional, unbudgeted pension payment requirements "could only come from the discretionary portion of the budget, i.e., the monies allocated for the delivery of sanitation, fire-fighting, police and other uniformed services." Brief in Support of Petitioners at 21 n.9, *Florida v. Long*, 487 U.S. 223 (1988) (No. 86-1685). Moreover, the uncertain nature of financial markets makes it essential for plan administrators to protect existing commitments against unforeseen decreases in plan assets. Retroactive application would add to this already difficult burden.[4]

Another reason this Court declined to approve the retroactive award of damages in *Norris* was that employers had reasonably assumed that their pension programs were lawful even if they did not require

[4] In any event, because the 1986 OBRA amendments require all employers to accrue benefits past normal retirement age, applying the amendments only prospectively does not hamper their purpose. *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1099-1100.

pension accruals after normal retirement age. 463 U.S. at 1106 (citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 720 (1978)). Similarly, in the instant case, to now impose a requirement on all employers to include pre-enactment service years when calculating accrued benefits will have a devastating effect on employers who—recognizing that such accruals were not required—did not fund their pension plans to provide for such accruals.

In *Norris*, this Court held, "There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only." 463 U.S. 1073 at 1107 (footnote omitted). Thus, the Ninth Circuit erred by failing to examine its imposition of retroactive relief for its effects on other retirement plans, the economy, and on innocent third parties.

II. IF AFFIRMED, THE NINTH CIRCUIT'S DECISION WILL HAMPER THE USE OF EARLY RETIREMENT INCENTIVE PROGRAMS AND RELEASES CONTRARY TO THE INTENT OF CONGRESS

A. The Older Workers Benefit Protection Act Expressly Recognizes that an Employer May Obtain a Release or Waiver in Connection with an Exit Incentive or Other Employment Termination Program

The Ninth Circuit held that Lockheed acted in violation of ERISA by amending the Plan to condition eligibility for enhanced retirement benefits on a release of claims. ERISA is a statute which governs the administration of employer-provided benefit plans. 29 U.S.C. § 1003. ERISA does not, however, directly address the ability of an employer to obtain a release

as a prerequisite to offering an exit incentive or other employment termination program. Nonetheless, the effect of the ruling below will be an inhibition on the use of exit incentive programs and releases. This result is contrary to Congressional intent in the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990) (OWBPA), the statute that recognizes Congressional approval of early retirement incentive programs and specifically sanctions the ability of employers to obtain a release in exchange for an exit incentive or other employment termination program.

In *Public Employees Retirement System v. Betts*, this Court held that employee benefit plans were excepted from ADEA. 492 U.S. 158 (1989). In response, Congress enacted OWBPA, which amended ADEA. OWBPA is a remedial statute intended both to emphasize ADEA's application to benefit plans and to ensure the ability of older workers to enjoy early retirement incentive programs without fear of age discrimination.

Through Title II of OWBPA, Congress reaffirmed the ability of employers to rely on "knowing and voluntary" waivers under ADEA. § 201, 104 Stat. at 983. As a safeguard to protect the interests of older workers, OWBPA created a series of protections for employers to follow in order to verify that a waiver is knowing and voluntary.[5] Moreover,

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[5] When a waiver or release is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees the process requires that (1) the waiver be part of a written agreement; (2) the waiver specifically refer to rights or claims arising under ADEA; (3) the employee may not waive rights or claims that may arise after the date the waiver is signed; (4) the employee waives rights or claims only in exchange for con-

OWBPA provides that in the event of any dispute over whether a waiver was knowing and voluntary, the party asserting the validity of the waiver has the burden of proving that each of the requirements was met. § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

OWBPA's pasage affirms the validity of early retirement incentive programs. Indeed, the Statement of Managers[6] provides:

> We recognize that employees may welcome the opportunity to participate in such programs, and we do not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs rather than resorting to involuntary layoffs.

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sideration in addition to anything of value to which the employee is already entitled; (5) the employee is advised in writing to consult with an attorney prior to signing the agreement; (6) the employee be given a period of 45 days during which to confer the agreement; (7) the employee be given at least 7 days to revoke the agreement; (8) the employer inform each employee in writing as to the class, unit, or group of employees covered by the program, any eligibility factors and any time limits applicable to the program; and (9) the employer inform each employee in writing as to the job titles and ages of all employees eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. § 201, 104 Stat. at 983-84 (amending 29 U.S.C. § 626).

[6] OWBPA was the product of a compromise in the Senate that significantly modified the bill as previously reported by the Senate Labor and Human Resources Committee. The Statement of Managers had the effect of revising the prior legislative history.

136 Cong. Rec. S13,596 (daily ed. Sept. 24, 1990). Congress clearly intended OWBPA to provide a safe harbor for exit incentives:

> [OWBPA] grants a safe harbor for the two most common forms of exit incentives: Pension subsidies and Social Security bridge payments. According to the General Accounting Office, as many as two-thirds of the early retirement incentives offered by employers take one of these two forms. . . . This bill now immunizes from challenge two-thirds of the early retirement incentive programs offered by employers today.

136 Cong. Rec. S13,603 (daily ed. Sept. 24, 1990) (Statement of Sen. Pryor).

In July 1992, EEOC solicited public comment on certain provisions of OWBPA. 57 Fed. Reg. 10,626 (1992). In response, the principal authors of OWBPA[7] sent a letter which provided as follows:

> Congress intended this protective legislation to be liberally construed in order to effectuate the remedial purposes of prohibiting discrimination in the areas of employee benefits and providing safeguards for individuals who are asked to waive their rights under ADEA.

Thus, the principal authors of OWBPA affirmed the legitimacy of employers' use of "knowing and voluntary" waivers under ADEA. In direct contravention of the intent of OWBPA's principal authors, the Ninth Circuit's decision jeopardizes the ability of

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[7] The principal authors of OWBPA were Senator David Pryor (D-Arkansas), Senator Howard Metzenbaum (D-Ohio), Representative Matthew Martinez (D-California), Representative William L. Clay (D-Missouri), Representative Edward R. Roybal (D-California), and Representative William D. Ford (D-Michigan).

employees to receive additional benefits to which they would not otherwise be entitled in exchange for signing a release.

B. Employers May Cease to Offer Enhanced Benefits to Employees at All if They Are Denied the Ability to Obtain Releases

Like Lockheed, many employers who are faced with the necessity of workforce reductions offer generous severance benefits, far in excess of any to which employees otherwise would be legally entitled. These programs offer substantial financial benefits to employees. Some employers offer early retirement incentives and other voluntary termination programs in lieu of layoffs. Because employers voluntarily offer benefits in excess of those that they are legally obligated to provide, employers frequently require employees who choose to accept these additional benefits to execute a waiver of claims in return. In this manner, an employer buys a litigation-free future in exchange for awarding substantial extra benefits to employees.

OWBPA already places a significant administrative burden on employers who wish to secure releases in exchange for supplemental severance benefits. Congress was aware of this burden, but deemed it necessary in order to protect employees against the possibility of being coerced or misled into signing releases that were not truly knowing and voluntary.

The burden placed on employers who seek releases will be increased well beyond the level envisioned by Congress in OWBPA, however, if this Court adopts the Ninth Circuit's holding. If ERISA is construed to deny employers the ability to obtain releases, it

follows that many will cease offering enhanced severance benefits to their employees at all. Thus, many employers will conclude that the administrative burdens, risks and restrictions on obtaining releases simply outweigh any benefits they provide. The result will be that layoffs will still occur, but without the additional severance benefits offered in the past.

CONCLUSION

For the reasons stated herein, EEAC respectfully submits that the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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February 27, 1996

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(13)

No. 95-809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOCKHEED CORPORATION, *et al.*,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT........................ 2

ARGUMENT 3

I. ERISA Contains a Carefully Integrated Set of Enforcement Provisions That Precludes Equitable Relief Against Nonfiduciary Parties In Interest 5

II. ERISA's Legislative History Establishes Unequivocally That ERISA Title I Does Not Impose Liability on Nonfiduciary Parties In Interest.................................. 12

III. The Arguments of the Courts of Appeals That Have Found Party In Interest Liability Are Unpersuasive . 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases:

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 21

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 11

Landwehr v. DuPree, 72 F.3d 726 (9th Cir. 1995) 4

Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit, 507 U.S. 163, 113 S.Ct. 1160 (1993) 21

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 6,22

Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063 (1993) .... *passim*

Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers, 414 U.S. 453 (1974) 21

Peacock v. Thomas, No. 94-1453 (U.S. Feb. 21, 1996) 6,18

Reich v. Compton, 57 F.3d 270 (3d Cir. 1995) 17,18,19

Reich v. Fowler, 89 Civ 0224 (S.D.N.Y.) 11

Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994) 4,18

Reich v. South Carolina National Bank, et al., CV-92-L-2858-NE (N.D.Ala.) 11

Reich v. Stangl, 73 F.3d 1027 (10th Cir. 1996) 4,17,19

Statutes and Rules:

26 U.S.C. § 4975 .... *passim*

29 U.S.C. § 1002 8,11

29 U.S.C. § 1101 21

29 U.S.C. § 1104 4

29 U.S.C. § 1106 .... *passim*

29 U.S.C. § 1108 1,7,8,10

29 U.S.C. § 1132 .... *passim*

Other Authority:

G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 901 (rev. 2d ed. 1982) 12

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted* in 1974 U.S.C.C.A.N. 5038 .... *passim*

Restatement (Second) of Trusts § 326 (1959) 12

S.4, 93d Cong., 1st Sess. (1973), *reprinted in* Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (1976) 13

S.1179, 93d Cong., 1st Sess. (1973), *reprinted in* Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (1976)......... 13

Statement by the Hon. Harrison A. Williams. Jr. Upon Introducing the Conference Report on H.R. 2, *reprinted in* 1974 U.S.C.C.A.N. 5177............................16,17,19

INTEREST OF AMICUS CURIAE*

New England Legal Foundation ("NELF") is a non-profit public interest law firm whose membership consists of corporations, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has appeared regularly in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the business community.

A number of NELF's members and supporters, including insurance companies and accounting firms, provide services to employee benefit plans. As such, they are "parties in interest" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* NELF is concerned with the Ninth Circuit's holding in this case that a party in interest may be liable for equitable relief for participating in a prohibited transaction under ERISA. ERISA precludes a fiduciary from knowingly causing a plan to pay more than "reasonable compensation" for services provided to the plan; it imposes no complementary obligation on the service provider. 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2). Application of the Ninth Circuit's rule would make the service provider the guarantor of the fiduciary's obligation. Under this rule, a service provider could be

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* The parties have consented to the filing of this brief. Amicus has filed letters of consent with the Clerk.

required to return to an employee benefit plan any "excess compensation" paid by the plan, if a court determines after the fact that the plan paid more than reasonable compensation for the services. Such liability is particularly pernicious because it is without fault; a service provider's fees might be deemed unreasonable even if the provider charged the plan its ordinary fees, readily paid by other customers or clients. ERISA imposes an obligation on fiduciaries to look after plan assets; it places no such responsibility on service providers and other nonfiduciary parties in interest.

SUMMARY OF ARGUMENT

The Ninth Circuit in this case held Lockheed Corporation liable for equitable relief as a party in interest to a prohibited transaction under ERISA. ERISA imposes no such liability. By the plain language of ERISA section 406, 29 U.S.C. § 1106, only fiduciaries are prohibited from engaging in certain transactions. Equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), is available only against those who violate a provision of ERISA Title I. Because participation in a prohibited transaction is not a violation of ERISA Title I for parties in interest, there is no relief against them under section 502(a)(3).

ERISA provides a carefully crafted and detailed enforcement scheme related to prohibited transactions, including enforcement against parties in interest, that precludes inference of any equitable relief against these parties. Part 4 of Title I of ERISA concerns fiduciary responsibility, and section 502(a)(3) establishes liability for violations of Part 4. Internal Revenue Code section 4975, 26 U.S.C. § 4975, enacted as part of Title II of ERISA, creates an enforcement mechanism against certain

parties in interest for participation in prohibited transactions. ERISA's language and legislative history reveal a deliberate separation of prohibited transaction enforcement: Fiduciary responsibility is the province of ERISA Title I, consistent with the traditional trust law focus on fiduciaries, while parties in interest are the subject of the tax code. Indeed, Congress expressly rejected an earlier provision for party in interest liability under ERISA Title I. There is no such liability in ERISA as enacted.

Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063 (1993), also directs the result here. This Court indicated in *Mertens* that nonfiduciaries are not liable under ERISA for knowing participation in a fiduciary breach because ERISA nowhere expressly prohibits such participation. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach. If, as *Mertens* suggests, there is no nonfiduciary liability for participating in a fiduciary breach, it follows that there is no nonfiduciary party in interest liability for a prohibited transaction. Despite the existence of certain dicta in *Mertens* suggesting that parties in interest may be liable for equitable relief, the logic of that opinion precludes any such liability.

ARGUMENT

ERISA section 406, 29 U.S.C. § 1106, defines a prohibited transaction as a form of fiduciary breach. That statutory section describes each such transaction as a prohibition on fiduciary conduct. The Ninth Circuit in this case declared that Lockheed's amendment of its employee benefit plan to create early retirement incentive programs was a prohibited transaction under section 406. Amicus agrees with the petitioners that the Ninth Circuit's

prohibited transaction ruling thereby incorporated implicitly a holding that Lockheed's amendment of the plan was a fiduciary act. Amicus agrees with the petitioners as well that this holding is reversible error.

Amicus in this brief challenges an interrelated portion of the Ninth Circuit's decision. While the Ninth Circuit denied holding that Lockheed's plan amendment was a fiduciary act, Pet. App. 14a n.5, despite the necessity of its having done so, the court held explicitly that Lockheed was liable under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), as a party in interest who benefited from a prohibited transaction, irrespective of Lockheed's fiduciary status. Pet App. 14a-15a. That holding also is error.

Amicus is aware that certain language in *Mertens* indicates that a party in interest who participates in a prohibited transaction may be held liable for equitable relief under ERISA section 502(a)(3). *See* 113 S.Ct. at 2067 n.4, 2071-72. To the extent these dicta can be read as declaring liability under ERISA section 502(a)(3) for parties in interest who are not also fiduciaries, the present amicus contends that these statements in *Mertens* do not accurately describe the law. Indeed, these statements are inconsistent with the logic of the *Mertens* opinion. Nonetheless, some courts of appeals have used these dicta to support a conclusion that section 502(a)(3) creates party in interest liability. *E.g.*, *Reich v. Stangl*, 73 F.3d 1027, 1031-32 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 (1st Cir. 1994) (dictum). Amicus asks that the Court expressly disavow its *Mertens* dicta and declare in error these courts of appeals and the Ninth Circuit's holding in the present case.

I. ERISA Contains a Carefully Integrated Set of Enforcement Provisions That Precludes Equitable Relief Against Nonfiduciary Parties In Interest

ERISA Title I, Part 4 is entitled "Fiduciary Responsibilities." Contained within that Part is ERISA section 406, 29 U.S.C. § 1106, which defines certain prohibited transactions. By its plain language, section 406 describes each prohibited transaction as a restriction on fiduciary conduct. For example, section 406(a)(1)(D), at issue here, declares that "A *fiduciary* with respect to a plan shall not cause the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes a direct or indirect ... transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D) (emphasis added). Only fiduciaries are obligated not to engage in such transactions. There is nothing in ERISA section 406 that prohibits a party in interest who is not also a fiduciary from engaging in any of the transactions described therein.

ERISA section 502(a) provides for civil enforcement of the other provisions of ERISA Title I. Section 502(a)(3), upon which the Ninth Circuit and the respondent relied in this case, allows a civil action by a plan participant, beneficiary, or fiduciary to enjoin, or obtain other appropriate equitable relief for, "any act or practice which violates any provision of this title." 29

U.S.C. § 1132(a)(3).[1] The participation in a prohibited transaction by a party in interest who is not a fiduciary is not a violation of any provision of Title I. There is, therefore, no liability under section 502(a)(3) for such a party in interest. As this Court recently reemphasized, "Section 502(a)(3) 'does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or ... enforc[ing] any provisions" of ERISA or an ERISA plan.'" *Peacock v. Thomas*, No. 94-1453, slip op. at 3-4 (U.S. Feb. 21, 1996) (quoting *Mertens*, 113 S.Ct. at 2067) (emphasis original).

Because the plain language of ERISA sections 406 and 502(a) does not establish party in interest liability, affirmance of the Ninth Circuit's rule would require this Court to infer a cause of action. No such inference is permissible. This Court has twice expressed its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 113 S.Ct. at 2067 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)).

The Court explained in *Mertens* that nonfiduciaries are very likely not liable under ERISA for knowing participation in a fiduciary breach, even though such

[1] Section 502(a)(5), 29 U.S.C. § 1132(a)(5), allows an identical action by the Secretary of Labor.

liability was well established under the common law, because ERISA nowhere expressly prohibits such participation. 113 S.Ct. at 2067. The Court noted that "only some common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely, those who fall within ERISA's artificial definition of 'fiduciary.'" *Id.* at 2068 n.5. That conclusion directs the result here. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach. Every prohibited transaction under ERISA section 406 is also a fiduciary breach under section 404, 29 U.S.C. § 1104, and section 404, like section 406, places the burden for avoiding the fiduciary breach on the fiduciary, where it traditionally falls. If, as *Mertens* indicates, there is no nonfiduciary liability—knowing or otherwise—for participating in a fiduciary breach, it follows that there is no nonfiduciary party in interest liability for a prohibited transaction. Accordingly, despite the existence of certain dicta in *Mertens* suggesting that parties in interest may be liable for equitable relief, the logic of that opinion precludes any such liability.[2]

[2] In *Mertens*, the Court mistakenly observed that, pursuant to ERISA sections 406(a) and 408(b)(2), a party in interest may not offer services to the plan for more than "reasonable compensation." 113 S.Ct. at 2067 n.4. On that basis, the Court assumed that parties in interest may be liable for participating in a prohibited transaction. *Id.* at 2071-72. But neither section 406 nor section 408 impose any restriction as to the price the party in interest may seek for the services it provides the plan. Instead, these sections only direct the *fiduciary* not to contract for services necessary for the operation or establishment of the plan at

[Footnote continued on next page]

This Court should not infer a cause of action against nonfiduciary parties in interest under ERISA sections 502(a)(3) and (5) precisely because ERISA provides a "carefully crafted and detailed enforcement scheme" related to prohibited transactions, including enforcement against parties in interest, which does not include equitable relief against nonfiduciary parties in interest. Part 4 of Title I of ERISA concerns fiduciary responsibility, and sections 502(a)(3) and (5) establish liability for violations of Part 4. Internal Revenue Code ("IRC") section 4975, 26 U.S.C. § 4975, enacted as part of Title II of ERISA, creates an enforcement mechanism against certain parties in interest for participation in prohibited transactions.

Section 4975 imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction (other than a fiduciary acting only as such)." 26 U.S.C. § 4975(a). The Internal Revenue Code defines "disqualified person" almost identically to "party in interest" under ERISA. *Compare* 26 U.S.C. § 4975(e) *with* 29 U.S.C. § 1002(14). Disqualified persons (other than fiduciaries acting only as fiduciaries) are subject to a 5 percent excise tax on each prohibited transaction. If the transaction is not corrected within the taxable period

[Footnote continued from previous page]

"more than reasonable compensation." 29 U.S.C. § 1108(b)(2). Because the premise of the dicta—that a party in interest, like a fiduciary, is prohibited from engaging in a prohibited transaction—is not founded in the statutory language, the complementary conclusion that a party in interest is liable for a prohibited transaction also must fail.

following imposition of the 5 percent tax, the disqualified person is subject to a tax equal to 100 percent of the amount involved in the prohibited transaction. 26 U.S.C. § 4975 (a), (b).

Congress provided for excise tax liability against parties in interest in the Internal Revenue Code; it provided for equitable relief against fiduciaries in ERISA Title I.[3] Congress did not "simply forget" to provide for equitable relief against parties in interest in ERISA Title I, just as it did not simply forget to provide for an excise tax against pure fiduciaries, *i.e.*, "fiduciaries acting only as such," in the Internal Revenue Code.[4]

3 There is a strong argument that the IRC section 4975 tax is applicable only to parties in interest who are also fiduciaries. *See* n. 7 *infra*. That is, ERISA may impose no liability on nonfiduciaries at all, either under Title I or Title II (the tax provisions). *See Mertens*, 113 S.Ct. at 2068 n.5 ("only some common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely, those who fall within ERISA's artificial definition of 'fiduciary'"). Regardless of the scope of party in interest liability under IRC section 4975, however, it is plain that ERISA sections 502(a)(3) and (5) reach fiduciaries only, and provide no cause of action against nonfiduciary parties in interest.

4 ERISA section 502(i) reinforces the exclusivity of the remedies under ERISA section 502 and IRC section 4975. Section 502(i) calls for the Secretary of Labor to impose a 5 percent/100 percent "civil penalty"—akin to the IRC section 4975 excise tax—on a party in interest engaging in a prohibited transaction, *but only for prohibited transactions related to plans of a type not covered by IRC*

[Footnote continued on next page]

Section 502(a)(3) and (5) enforcement against nonfiduciary parties in interest would be particularly anomalous if, as some have argued, 502(a)(3) and (5) party in interest liability is without fault. Civil liability against a fiduciary for a prohibited transaction with a party in interest requires knowing participation on the part of the fiduciary. See ERISA § 406(a)(1), 29 U.S.C. §1106(a)(1) ("A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, *if he knows or should know* that such transaction ...") (emphasis added). In contrast, to the extent section 406 can be read to prohibit a party in interest from participation in a prohibited transaction, there appears to be no similar scienter requirement. Thus, a party in interest could be held liable, under the Ninth Circuit's rule, for *nonknowing* participation in a prohibited transaction.

Such a result would be disastrous in practice. For example, ERISA section 406(a)(1)(C), in conjunction with section 408(b)(2), prohibits a fiduciary from causing a plan to pay more than "reasonable compensation" for services. 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2). A

[Footnote continued from previous page]
section 4975. 29 U.S.C. § 1132(i). Those non-pension plans are not relevant here.

It is uncertain whether the section 502(i) civil penalty applies to nonfiduciary parties in interest. It should not. ERISA section 502 is merely an enforcement provision; it creates no new liability. ERISA section 406 establishes that nonfiduciary parties in interest are not precluded from participation in a prohibited transaction. Regardless, the scope of section 502(i) liability is not an issue in this case.

party in interest under ERISA includes any plan service provider. 29 U.S.C. § 1002(14)(B). A service provider who charges a plan the same rate it charges its other customers could be liable, under the Ninth Circuit' rule, to return "excess compensation" to the plan if a court later determines that the provider's rate was not "reasonable." Similarly, if a fiduciary unthinkingly accepted a service provider's perhaps high-priced opening offer without negotiating, the innocent service provider and the imprudent fiduciary would be equally liable to restore the plan's losses. Imposing nonfiduciary liability in either circumstance would make the service provider the guarantor of the fiduciary's duty to ensure that the plan does not overpay for services.[5] There is nothing in ERISA that supports such a regime. Indeed, strict liability against nonfiduciaries is at war with a statutory scheme principally concerned with fiduciary responsibility that nonetheless requires scienter before establishing fiduciary liability.

Strict liability against nonfiduciaries also is inconsistent with traditional trust law principles, which form the basis of the ERISA Title I provisions. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989). The equitable remedies imposed against nonfiduciaries under the common law of trusts were

[5] The preceding scenarios are more than hypothetical. The Secretary of Labor has brought strict liability claims against service providers and other parties in interest in several cases, relying on the Ninth Circuit's rule. *See, e.g.*, *Reich v. South Carolina National Bank, et al.*, CV-92-L-2858-NE (N.D.Ala.); *Reich v. Fowler*, 89 Civ 0224 (S.D.N.Y.).

limited to those nonfiduciaries who knowingly participated in breaches of fiduciary duty. *See, e.g.*, Restatement (Second) of Trusts § 326 (1959) (a "third person who ... *has notice that the trustee is committing a breach of trust* and participates therein is liable to the beneficiary for any loss caused by the breach of trust") (emphasis added); *id.* comment a ("If a third person participates with the trustee in committing a breach of trust, *knowing that he is committing a breach of trust*, he is liable to the beneficiary for participation in the breach of trust.") (emphasis added). Absent such evidence of affirmative actions knowingly aiding and abetting a breach, common law courts refuse to impose liability. *Id.* The key to third party liability "is whether the third person knew or should have known that he was taking part in a breach." G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 901, p. 262 (rev. 2d ed. 1982).

In *Mertens*, this Court suggested strongly that ERISA creates no cause of action against a nonfiduciary for *knowing* participation in a fiduciary breach, despite the fact that such claims are available under the common law, because ERISA contains no express language creating such a claim. 113 S.Ct. at 2067. It would be ironic indeed if ERISA were nonetheless to create a claim for *nonknowing* participation by a nonfiduciary party in interest in a prohibited transaction in the absence of supporting language and contrary to the common law.

II. ERISA's Legislative History Establishes Unequivocally That ERISA Title I Does Not Impose Liability on Nonfiduciary Parties In Interest

Congress considered carefully the possibility of civil liability against a party in interest for participation in

a prohibited transaction, and rejected it. The Senate version of the bill that became ERISA contained an express provision for party in interest liability:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

S.4, 93d Cong., 1st Sess. § 15(h) (1973), *reprinted in* Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* ("*Legislative History*") at 1450 (1976). *See also* S.1179, 93d Cong., 1st Sess. § 501(d)(17) (1973), *Legislative History* at 955-56. The original House bill contained no provision for liability against parties in interest, but provided only for fiduciary liability for participation in prohibited transactions. *See* H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) ("Conference Report"), *reprinted* in 1974 U.S.C.C.A.N. 5038, 5075.

The conference resolved the differences between the bills by adopting the present system of divided enforcement. Fiduciary responsibility is the province of ERISA Title I, consistent with the traditional trust law

focus on fiduciaries, while parties in interest are the subject of the tax code:[6]

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules; this is similar to the approach taken under the present rules against self-dealing that apply to private foundations.

Conference Report, 1974 U.S.C.C.A.N. at 5076. Title I prohibits *only fiduciaries* from engaging in certain transactions: "The labor provisions deal with the structure of plan administration, provide general standards of

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[6] The rejected provision for party in interest liability in the Senate bill would have imposed liability only for knowing participation in a prohibited transaction. The Ninth Circuit's rule would bring back such liability on a nonknowing basis.

conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' *which plan fiduciaries are not to engage in.*" *Id.*, 1974 U.S.C.C.A.N. at 5076 (emphasis added). *See also id.* at 5087 ("Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. ... On the other hand, the tax provisions (title II) focus on the disqualified person.").

The discussion of liability in the Conference Report emphasizes that only fiduciaries, and parties in interest not covered by IRC section 4975, are subject to liability under Title I of ERISA (and these parties in interest are subject only to the 5 percent/100 percent civil penalty of section 502(i)). Other parties in interest are subject only to the section 4975 excise tax:

> *Civil liability*
>
> *Fiduciaries.*—Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach. ... .
>
> *Party-in-interest.*—A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified (at the time of the transaction) under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

. . .

Excise tax on prohibited transactions

> *In general.*—As indicated above, the substitute establishes an excise tax on disqualified persons who participate in specific prohibited transactions respecting a pension plan. The tax applies with respect to a plan which has qualified after the effective date of the prohibited transaction provisions ... .

Conference Report, 1974 U.S.C.C.A.N. at 5100-01.

Finally, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the Conference Report, explained that enforcement of fiduciary duties belongs to the Secretary of Labor under ERISA Title I, but parties in interest not subject to the section 502(i) civil penalty are solely within the domain of the Internal Revenue Service:

> Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations *on the part of fiduciaries*. He is also authorized to impose civil penalties on parties in interest who participate in prohibited transactions with welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. *However, the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"*—similar to parties in interest defined in the labor portion of the conference substitute—with authority to impose excise taxes on violators.

Statement by the Hon. Harrison A. Williams. Jr. Upon Introducing the Conference Report on H.R. 2 ("Williams Statement"), *reprinted in* 1974 U.S.C.C.A.N. at 5177, 5188 (emphasis added).

ERISA's legislative history reveals that Congress did not inadvertently omit nonfiduciary party in interest liability from the comprehensive enforcement scheme set out in the statute. Congress deliberately declined to place on nonfiduciary parties in interest liability for equitable relief.

III. The Arguments of the Courts of Appeals That Have Found Party In Interest Liability Are Unpersuasive

None of the courts of appeals that have found party in interest liability under ERISA section 502(a) have considered the integrated enforcement scheme or the extensive legislative history discussed above. Rather, these courts have relied largely on the decisions of other courts, and this Court's dicta in *Mertens*. *See* Pet App. 15a; *Stangl*, 73 F.3d at 1030-32; *Reich v. Compton*, 57 F.3d 270, 285-86 (3d Cir. 1995). Substantive analysis in these cases has been confined to two principal arguments, neither of which can be squared with the language and history of ERISA.

Several courts have relied on the apparent breadth of the enforcement language in ERISA sections 502(a)(3) and (5). Thus, the *Compton* court concluded that section

502(a)(3) applies to parties in interest because "section 502(a)(3)'s language expressly grants equitable power to redress violations of ERISA [and] prohibited transactions plainly fall within this category." 57 F.3d at 285-86 (internal quotations omitted). The court in *Rowe* noted similarly that section 502(a)(5) "reaches 'acts or practices' that violate ERISA and prohibited transactions violate § 1106." 20 F.3d at 31 n.7.

The problem with these syllogisms is that one of the material premises is false. Prohibited transactions are *not* violations of ERISA for parties in interest; ERISA section 406 only makes it illegal for a *fiduciary* knowingly to engage in, or cause a plan to engage in, a prohibited transaction. Little more need be said on this point given this Court's recent pronouncement on the issue, already noted: "Section[s] 502(a)(3) [and (5)] 'do[] not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or ... enforc[ing] any provisions" of ERISA or an ERISA plan.'" *Peacock*, slip op. at 3-4 (quoting *Mertens*, 113 S.Ct. at 2067) (emphasis original). Accordingly, there is no liability against nonfiduciary parties in interest under sections 502(a)(3) and (5) for participation in a prohibited transaction.

Some courts of appeals have reached the same erroneous result about party in interest liability by relying upon IRC section 4975(h). That section requires the Secretary of the Treasury to notify the Secretary of Labor before sending a notice of deficiency with respect to the disqualified person excise tax. The notice is meant to provide the Secretary of Labor "a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). These courts have been too quick to conclude that the statute's contemplation that the Secretary of Labor

may "obtain a correction" of the prohibited transaction implies that the Secretary can sue a party in interest for restitution or rescission. *Stangl*, 73 F.3d at 1034; *Compton*, 57 F.3d at 286.

The conclusion does not follow. The section 4975(h) notice allows the Secretary of Labor only the "opportunity" to obtain a correction; he will not necessarily be able to achieve that result through civil suit in all cases. IRC section 4975(f)(5) defines a "correction" with respect to a prohibited transaction as "undoing the transaction *to the extent possible*, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. § 4975(f)(5) (emphasis added). Nothing in this definition requires, or necessarily implies, that such correction will be accomplished through civil suit against a nonfiduciary party in interest.[7] Where a disqualified person is also a

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[7] The reference in section 4975 to a disqualified person "acting under the highest fiduciary standards" implies strongly that the section 4975 excise tax applies only to disqualified persons who are also fiduciaries. This conclusion is bolstered by the fact that section 4975 calls on the Secretary of Labor to attempt to obtain a correction. The Secretary of Labor has primary jurisdiction over fiduciary conduct under ERISA. *See* 29 U.S.C. § 1132(a). *See also* Williams Statement, 1974 U.S.C.C.A.N. at 5188 ("Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor"). ERISA's legislative history also underscores that the particular concern of the section 4975 tax was self-dealing by ERISA fiduciaries. *See* Conference Report,

[Footnote continued on next page]

fiduciary, as is very often the case (although not in this case), the Secretary may be able to bring suit to rescind the transaction under ERISA section 502(a)(5). But correction is not "possible" through a civil suit against a nonfiduciary party in interest.[8]

In light of ERISA's language and structure and clear legislative history setting forth separate enforcement mechanisms for fiduciaries and parties in interest, the reference to "obtaining correction" in section 4975 is a slender reed from which to infer liability, especially because the section 4975 tax may not reach nonfiduciary parties in interest. *See* n.7 *supra*. Reliance on the "correction" language is an attempt to bring back through the tax code what Congress deliberately excluded from

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[Footnote continued from previous page]

1974 U.S.C.C.A.N. 5076 (section 4975 excise tax "is similar to the approach taken under the present rules against self-dealing that apply to private foundations"). Moreover, if the section 4975 excise tax were limited to fiduciary disqualified persons, the Secretary of Labor might well be able to obtain a correction through civil suit against all such disqualified persons under ERISA section 502(a)(5).

To the extent the Court's dicta in *Mertens* referring to equitable relief against parties in interest applies only to *fiduciary* parties in interest, the Court may have been correct.

[8] In any event, the courts of appeals' "obtain a correction" argument implies only a cause of action by the Secretary of Labor under ERISA section 502(a)(5). The present case involves a suit by a private party under section 502(a)(3).

ERISA.[9] But the fact that Congress did make certain parties in interest responsible to pay the section 4975 tax is all the more reason to believe that the absence of any language creating civil liability in ERISA Title I means that there is no such liability. *Expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 113 S.Ct. 1160, 1163 (1993); *Nat'l Railroad Passenger Corp. v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."). This Court has been "unwilling[] to infer causes of action in the ERISA context, since that statute's

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[9] If anything, the section 4975 process underscores the very limited role the Secretary of Labor has to play in assessing the contemplated tax on parties in interest. Congress intended to keep separate the enforcement mechanisms under ERISA Title I and Title II. Fiduciary liability is the province of ERISA Title I, consistent with the traditional trust law focus on fiduciaries, while parties in interest are the subject of the tax code. Conference Report, 1974 U.S.C.C.A.N. at 5076, 5087.

To be sure, the Secretary of Labor has limited authority under ERISA section 502(i), 29 U.S.C. § 1132(i), to assess penalties parallel to the IRC section 4975 tax against certain parties in interest for certain prohibited transactions. But that authority does not apply to transactions with respect to plans, like the retirement plan here, covered under ERISA section 401(a), 29 U.S.C. § 1101(a), which are subject only to the section 4975 tax.

carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 113 S.Ct. at 2067 (quoting *Russell*, 473 U.S. at 146-47). The Court should not draw such an inference here.

CONCLUSION

For the foregoing reasons, this Court should hold that ERISA does not authorize a suit for equitable relief against a nonfiduciary party in interest for participation in a prohibited transaction, and reverse the judgment of the Ninth Circuit.

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95

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE OLDER WORKERS BENEFIT PROTECTION ACT DOES NOT SANCTION AN EMPLOYER'S USE OF PENSION PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES. 4

II. LOCKHEED VIOLATED ERISA § 406(A)(1)(D) BY USING PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES. . . 7

A. ERISA § 406(A)(1)(D) Is Violated When a Party in Interest Uses Plan Assets or Receives a Benefit From Plan Assets 7

B. Lockheed is a Fiduciary with Liability for the Prohibited Transaction. 13

1. Lockheed is a Named Fiduciary Under the Plan. 13

2. Lockheed Is a Fiduciary By Implementing The Waivers. 14

3. Lockheed is a Fiduciary Under ERISA § 3(21) By Amending the Plan 14

III. OBRA 1986's BROAD PROHIBITION OF AGE DISCRIMINATION IN PENSION PLANS REQUIRES OLDER WORKERS WHO RETIRE AFTER JANUARY 1, 1988 TO RECEIVE PENSION CREDIT FOR ALL PRE-ACT YEARS OF SERVICE. 15

A. The Plain Language, Purpose, and Legislative History of § 9204(a)(1) Demonstrate that Congress Clearly Intended Inclusion of Pre-1988 Years of Service in Determining Pension Accruals. 18

B. Interpreting OBRA § 9204(a)(1) To Include Pre-1988 Years Of Service Is Consistent With The Interpretation Of Similar Effective Date Language In Other Legislation Affecting Pension Benefits. 20

C. Including Pre-OBRA Years of Service in a Final Benefit Accrual Does Not Cause the Statute to Have a "Retroactive Effect." 22

1. The "Events in Suit" -- Namely Lockheed's 1990 Plan Amendment and the Calculation of Spink's Accrued Benefit -- Occurred After the Effective Date of OBRA 1986. 22

2. The "Events in Suit" were Not Completed Until 1990 When Spink Retired. 26

D. Granting Spink and Similarly Situated Individuals Credit for Their Pre-1988 Service Will Not Cripple Private Pension Plans 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

AARP v. EEOC,
655 F. Supp 228 (D.D.C.), *rev'd in part*,
823 F.2d 600 (D.C. Cir. 1987) 2

AARP v. Farmers Group,
700 F. Supp. 1052 (C.D Cal. 1988), *aff'd*,
943 F.2d 996 (9th Cir. 1991), *cert. denied*,
502 U.S. 1059 (1992) 2

ACTWU v. Murdock,
861 F.2d 1406 (9th Cir. 1988) 15

Bazemore v. Friday,
478 U.S. 385 (1986) 24, 25

Caspari v. Bohlen,
114 S. Ct. 948 (1994) 7

Cohen v. Martin's,
694 F.2d 296 (2d Cir. 1982) 18

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993) 8

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. —, 115 S. Ct. 1223 (1995) 14

Crosland v. Charlotte Eye, Ear and Throat Hospital, 686 F.2d 208
(4th Cir. 1982) 24

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) 5

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) 9

Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) 8

Equal Employment Opportunity Commission v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983) 24

Florida v. Long, 487 U.S. 223 (1988) 25

John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank, 114 S. Ct. 517 (1993) 2

Harnett v. CSA Financial Corp., No. 94-3252-C (Mass. Sup. Ct. Sept 27, 1995), *reported in* (BNA) Daily Labor Report No. 197 A-5 (10/12/95) . 9, 10

Hawkins v. Merchants National Bank, No. 92-1876 (E.D. Cal. Oct. 13, 1995), *reported in* 22 (BNA) Pension & Benefits Reporter (Nov. 6, 1995) 9

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 6

Hishon v. King & Spalding, 467 U.S. 69 (1984) 24

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1978) 11

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 23

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) 17, 22, 26

Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987) 8

McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995) 12

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 8

Mister v. Ill. Central Gulf Rr. Co., No. 81-3006 (D.C. S. Ill. August 5, 1993) 10

Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991) 25

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 26

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) 6

Puckett v. United Air Lines, Inc., 705 F. Supp. 422 (N.D. Ill. 1989) 25, 26, 27

Republic National Bank of Miami v. United States, 506 U.S. 80 (1992) 23

Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989) 24

Russello v. United States, 464 U.S. 16 (1983) 19, 20

Simpson v. Ernst & Young, No. 1-91-196 (D.C.S. Ohio May 12, 1994), *reported in* (BNA) Daily Labor Reporter No. 92 A-5 (5/16/94) 10

Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund, 979 F.2d 444 (6th Cir. 1992) . . . 24

Stewart v. National Shopmen Pension Fund, 563 F. Supp. 773 (D.D.C. 1983), *rev'd on other grounds*, 735 F.2d 1552 (D.C. Cir. 1984) 18

Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 8

Trans World Airlines v. Thurston,
469 U.S. 111 (1985) 5, 23

United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982) . . . 15

Varity Corp. v. Howe,
1996 U.S. LEXIS 1954 (March 19, 1996) 2, 10, 14

STATUTES AND REGULATIONS

Age Discrimination in Employment Act (ADEA),
29 U.S.C. § 621 *et seq.* . . . . *passim*

29 U.S.C. § 623(f)(2)(b)(i) 6

29 U.S.C. § 623(f)(2)(b)(ii) 6

29 U.S.C. § 623(j)(1)(A) 18

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* 2, 15

§ 2b(c)(3), 29 U.S.C. § 1001b(c)(3) 11

§ 2(c), 29 U.S.C. § 1001(c) 11

§ 3(21)(A), 29 U.S.C. § 1002(21)(A) 13, 14, 15

§ 3(14)(C), 29 U.S.C. §1002(14)(C) 9

§ 105, 29 U.S.C. § 1025 10

§ 202(a)(2), 29 U.S.C. § 1052(a)(2) 2, 16, 17

§ 203, 29 U.S.C. § 1053 10

§ 204, 29 U.S.C. § 1054 10

§ 204(b)(1)(G), 29 U.S.C.§ 1054(b)(1)(G) 18

§ 205, 29 U.S.C. § 1055 10

§ 206, 29 U.S.C. § 1056 10

§ 402(a)(1), 29 U.S.C. § 1102(a)(1) 12, 13

§ 402(a)(2), 29 U.S.C. § 1102(a)(2) 13

§ 403(a), 29 U.S.C. 1103(a) 12

§ 404(a)(1)(i), 29 U.S.C. § 1104(a)(1)(i) 10

§ 406, 29 U.S.C. § 1106(a)(1)(D) 8

§ 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) . . . . *passim*

§ 408(a), 29 U.S.C. § 1108(a) 9, 13

§ 408(b), 29 U.S.C. § 1108(b) 9

Internal Revenue Code (IRC), 26 U.S.C. § 1 *et seq.* 16

§ 410(a)(5) 22

§ 411 20

Older Workers Benefit Protection Act (OWBPA),
Pub. L. 101-433, 104 Stat. 978 (1990) 5, 6

Omnibus Budget Reconciliation Act of 1986,
Pub. L. No. 99-509, 100 Stat. 1874 (1986) . . . . *passim*

§ 9201 . . . . *passim*

§ 9202 . . . . *passim*

§ 9202(a)(1) 19, 20

§ 9203 . . . . 16, 17

§ 9204(a)(1) . . . . *passim*

§ 9204(b) 17

Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000(e)(k) 25

Retirement Equity Act, Pub. L. No. 98-397, 98 Stat. 1426 (1984) 20

§ 202 20

§ 303(a)(1) 20

§ 303(a)(2) 22

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 240(c)(1)(C), 96 Stat. 324 (1982) 21

Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 21

§ 1113 21

§ 1113(e) 21

§ 1113(e)(1) 21

§ 1113(e)(3) 21

29 C.F.R. § 2509.75-5 13

LEGISLATIVE HISTORY

132 Cong. Rec. H7709 (daily ed. September 18, 1986) . . . 21

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038 . . . . 13, 15

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MISCELLANEOUS

Department of Labor, *Labor Market Problems of Older Workers* (1989) 28

General Accounting Office, *Use of Waivers By Large Companies Offering Exit Incentives to Employees*, GAO/HRD 89-87 (1989) 4

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No. 95-809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons is a nonprofit membership organization of approximately 34 million persons age 50 and older. One of AARP's primary objectives is to promote the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension plans.

Since 1985, as part of its advocacy efforts, AARP has filed numerous briefs in the federal district and appellate courts and in the U.S. Supreme Court on behalf of older workers and retirees concerning employment and benefits under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA). In this Court, AARP

has participated as *amicus curiae* in, among others, the cases of *Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954 (March 19, 1996), and *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993). AARP has also directly litigated lawsuits challenging tne age-based denial of pension contributions and accruals. *AARP v. Farmers Group*, 700 F. Supp. 1052 (C.D Cal. 1988), *aff'd*, 943 F.2d 996 (9th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992); *AARP v. EEOC*, 655 F. Supp 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987).

Employers have offered early retirement incentive programs to many of AARP's 14 million actively employed members. As a condition of participation in some programs, employees are required to sign releases of employment claims against their employer. AARP's concern is that the consideration for such releases is paid with employer, not pension, funds. Also of concern to AARP is whether employers are using age to reduce pension benefit accruals, and therefore the amount of the pensions received by employees.

These AARP members, as well as other older Americans, who depend on private employer-sponsored pension plans for their economic security, have a significant interest in the affirmance of the decision below, which protects the amount and security of their pension benefits. In light of the significance of these issues to AARP and its members, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

This case presents two distinct claims. First, whether Lockheed violated ERISA's prohibited transaction rule by using plan assets to purchase releases from employees of all employment claims against Lockheed in exchange for enhanced pension benefits. Second, whether OBRA 1986, which amended the ADEA and ERISA, prohibits Lockheed from using an employee's age at hire as a factor to reduce the employee's pension benefit accrual at retirement. AARP submits that the Ninth Circuit reached the correct results in ruling for Spink on both claims.

ERISA establishes specific rules to protect the integrity and security of pension plans to insure that plan monies are used exclusively for the purpose of providing benefits to employees. When Lockheed used pension funds to purchase releases from its employees to prevent lawsuits against Lockheed as an employer, Lockheed ran afoul of the *per se* prohibition against a party in interest's use of plan assets. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

Lockheed and its *amici* proffer strained readings of ERISA to obfuscate the clarity of its actions. Behind the smoke and mirrors of Lockheed's various arguments is the fact that Lockheed is on all sides of the prohibited transaction, as a plan sponsor, as a named fiduciary in the plan itself, and as a party in interest that uses plan assets and receives a tangible benefit as the employer released of all liabilities from employees who sign waivers. Quite simply, Lockheed improperly used plan assets and in so doing violated ERISA § 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D).

The second question before the Court focuses on the construction of OBRA 1986. Congress enacted OBRA to prohibit pension plans from using age as a factor to reduce or deny pension benefits to older employees. AARP submits that Lockheed violated OBRA §§ 9201 and 9202 by using Spink's age at hire to deny him credited service which reduced his final benefit accrual at retirement. Because in a defined benefit plan the employee's final benefit accrual does not become fixed until retirement, OBRA §§ 9201 and 9202 require employers to provide service credit for years of service prior to OBRA's effective date for any employee with one hour of service after OBRA took effect.

The plain language, legislative history, and purpose of OBRA §§ 9201 and 9202 refute Lockheed's tortuous reading of the statute. OBRA §§ 9201 and 9202 apply expressly to "employees" and contain absolutely no language restricting their prohibitions to participants. OBRA mandates full service credit that cannot be reduced because of age.

The real issue is not whether OBRA operates prospectively

or retroactively. Behind Lockheed's diversionary emphasis on retroactivity is the fact that Lockheed amended its plan in 1990 to deny credited service to employees like Spink because of their age at hire. OBRA did not require this plan amendment. OBRA did not force Lockheed to disregard Spink's pre-participation years of service. Lockheed's action in 1990 constitutes a separate and distinct act of discrimination that violates OBRA, regardless of ERISA's pre-1986 language which permitted plans to exclude certain older employees.

For the foregoing reasons, AARP submits that the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. THE OLDER WORKERS BENEFIT PROTECTION ACT DOES NOT SANCTION AN EMPLOYER'S USE OF PENSION PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES.

This case first presents the simple and clear cut issue of the legality of an employer's use of pension plan assets to purchase litigation releases from employees. It is not about whether employers may generally provide enhanced pension benefits to entice employees to leave the company early. It is not about whether employers may generally use releases to prevent lawsuits.[1] It is about who pays for the release -- the company

that is being released from potential liability, or a pension plan whose assets are not to be used "by or for the benefit of" the company. ERISA § 406(a)(1)(d), 29 U.S.C. § 1106 (a)(1)(D).

Thus, it is immaterial to resolving the issues in this case that many employers have been offering exit or early retirement incentives to their employees for the past 15 years. It is immaterial that some employers use releases in such programs to prevent lawsuits against the company. The statistics about the incidence of early retirement incentive programs and references concerning the use of releases relied on by Lockheed and its *amici* say nothing about whether the enhanced benefits given in exchange for the releases were paid by the employer or the plan.

Lockheed and its *amici* suggest that by enacting the Older Workers Benefit Protection Act (OWBPA),[2] which defines the circumstances under which exit incentives and releases are prohibited by the ADEA, one can infer that Congress assumed the practice in this case would be lawful under ERISA. This is preposterous.

The OWBPA does not provide any intimation of Congress' views about plans' compliance with ERISA's provisions. Indeed,

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[1] While most employers do not seek releases of employment claims from employees who have been downsized or individually discharged, *see* General Accounting Office, *Use of Waivers By Large Companies Offering Exit Incentives to Employees*, GAO/HARD 89-87 at 4-5 (1989), other employers often use broad general releases to prevent a plethora of claims that could be based on state or federal laws. However, an employer could not, and likely would not, impose releases on a protected class of employees (e.g., just women or just older employees) or require release of only a specific statutory claim (e.g., Title VII or (continued...)

[1](...continued)
ADEA), in exchange for enhanced benefits or other consideration, because the employer would be "doling out a benefit in a discriminatory fashion." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

For example, if an employer "required terminated employees to give up only ADEA claims to obtain the enhanced benefits, older employees but not younger employees would be forced to give up something of value". . . and the employer "would have treated older workers differently than younger workers." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 723, 725 (3d Cir. 1995).

[2] Pub. L. 101-433, 104 Stat. 978, 983 (1990).

Congress recognized in passing the OWBPA that determining compliance with ERISA and compliance with the ADEA were separate and distinct inquiries. "A practice can be perfectly permissible under ERISA and the code and at the same time can be discriminatory under our civil rights laws." STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 102d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT 18 (Comm. Print 1991)(OWBPA LEGISLATIVE HISTORY). Conversely, as this Court held in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a practice may violate ERISA but not the ADEA. Apart from OBRA §§ 9201 and 9202, the ADEA and ERISA establish substantially different obligations for employers in their treatment of employees.

Moreover, the OWBPA does not constitute a congressional endorsement of employers' use of exit incentive programs or releases. To the contrary, the OWBPA was enacted primarily to protect older employees because employers were denying them benefits based on age and secondarily to prevent employer abuses in the use of releases. The OWBPA does not protect employers or legitimize employer practices.

Congress enacted the OWBPA "to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." OWBPA LEGISLATIVE HISTORY at 20.[3] Title I of the OWBPA sets forth the prohibitions that prevent employers from denying or reducing benefits based on age and provides for narrow affirmative defenses if the claims involve certain types of benefit plans, such as early retirement incentives. *See, e.g.*, 29 U.S.C. §§ 623(f)(2)(b)(i) & (ii). Title II of the OWBPA, which regulates releases of ADEA claims, was later added to prevent employer

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[3] OBRA and OWBPA clearly establish that employee benefit plans must comply with the ADEA, contrary to the reasoning and holding of *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). *See* H.R. REP. NO. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024; OWBPA Legislative History, at 3 expressly overruling *Betts*.

abuses in releases by setting forth minimum standards that an employer must meet for a release to be enforceable under the ADEA. It is simply revisionist history to infer that Congress sought to encourage the use of releases in exit incentive programs merely because these two bills were joined for purposes of passage.

II. LOCKHEED VIOLATED ERISA § 406(A)(1)(D) BY USING PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES.[4]

A. ERISA § 406(A)(1)(D) Is Violated When a Party in Interest Uses Plan Assets or Receives a Benefit From Plan Assets.

When Congress enacted ERISA, it understood that employees provide labor to an employer in exchange for a total compensation package, which may or may not include pension benefits. The value that an employer receives in this exchange

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[4] One of the more hotly contested issues before the Court appears to be the scope of the Court's grant of *certiorari*. *Certiorari* was granted on the narrow issue of whether a plan sponsor may be held liable for a breach of fiduciary duty under ERISA when it amends the terms of the pension plan. However, Lockheed and *amicus* Chamber of Commerce attempt to expand the scope of the question upon which *certiorari* was granted. *Compare* Question 1 in the **Questions Presented** in PETITIONER'S BRIEF at p. i, and AMICUS CHAMBER OF COMMERCE'S BRIEF at p. i *with* **Questions Presented** in PETITION FOR WRIT OF CERTIORARI. *See also* BRIEF OF AMICUS UNITED STATES at n. 2. SUP. CT. R. 14.1(a); *Caspari v. Bohlen*, 114 S.Ct. 948, 952 (1994) ("We have consistently declined to consider issues not raised in the petition for . . . *certiorari* . . . . Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

is the ability to operate its business with the employees' labor.[5] An early retirement incentive program provides the employer with the value of reducing its workforce. Payment of enhanced pension benefits to entice employees to leave is permissible as part of the employment paradigm. However, an employee's release of employment claims is an additional and distinct benefit that it is not inherent in the employee's departure. Thus, if the employer wants a release of such claims, it can provide additional consideration from its corporate funds. The only issue here is who can legally pay for the releases -- the employer or the plan.

In ERISA, Congress crafted elaborate provisions for the regulation of pension plans, including fiduciary standards of care for plan fiduciaries. Title I of ERISA, 29 U.S.C. §§ 1001-1114; *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Because Congress found that certain transactions automatically breached these standards, Congress made such transactions *per se* violations of ERISA, regardless of the good faith of the involved parties and the reasonableness or fairness of the transaction, in order to protect the financial integrity of pension plans and to ensure assets will be available to pay benefits. ERISA § 406, 29 U.S.C. § 1106; *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2d Cir. 1987); *Donovan v. Mazzola*, 716 F.2d 1226, 1237-28 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Accordingly, ERISA § 406(a)(1)(D) absolutely prohibits a party in interest from directly or indirectly using any plan assets, regardless of the

[5] Within this employment paradigm, however, an employee is not free to negotiate away statutory employment rights in order to receive more compensation. *See Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (statutory protections cannot be waived).

amount.[6] It also unequivocally prohibits a transaction involving plan assets which provides any benefit to a party in interest. Finally, it totally prohibits a transfer of plan assets to a party in interest.

In short, Lockheed has violated two of the prohibitions of ERISA § 406(a)(1)(D) by its use of plan assets and by its receipt of a benefit from the use of plan assets. Lockheed conditioned its provision of enhanced pension benefits on an employee's execution of a waiver of all employment claims against it. In other words, Lockheed, a party in interest,[7] clearly used plan assets (enhanced pension benefits) - a use that violates ERISA § 406(a)(1)(D). *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

Undeniably Lockheed also received a benefit from this use of plan assets -- an employee's release of potential employment claims for receipt of enhanced pension benefits. Such a benefit is not only more than incidental, it is real, significant and quantifiable. Liability for employment claims can cost employers millions of dollars.[8]

[6] ERISA § 406(a)(1)(D) states that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). The prohibition is absolute, barring any applicable statutory or administrative exemptions. ERISA §§ 408(a) & (b), 29 U.S.C. §§ 1108(a) & (b).

[7] No one disputes that Lockheed is a party in interest. *See* ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C).

[8] *E.g.*, *Hawkins v. Merchants National Bank*, No. 92-1876 (E.D. Cal. Oct. 13, 1995), *reported in* 22 (BNA) PENSION & BENEFITS REPORTER No. 44, at p. 2443 (Nov. 6, 1995) [$1.4 million award for age and sex discrimination claims]; *Harnett v. CSA Financial*

(continued...)

This is a transaction conducted with plan assets for the benefit of Lockheed, a party in interest, and clearly violates ERISA § 406(a)(1)(D).

Unquestionably, this is a strict reading of ERISA § 406(a)(1)(D). Some of Lockheed's *amici* suggest that such a reading would prohibit all benefit payments because employers receive a benefit from such payments. These *amici* conveniently ignore ERISA and the employment paradigm upon which it is based.[9]

To read ERISA § 406(a)(1)(D) as prohibiting benefit payments ignores the language, structure and purposes of the statute. *Cf. Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954, *14-15 (March 19, 1996) (in order to interpret ERISA's fiduciary duties, one must look at the language of the statute, its structure and its purposes). The general fiduciary standards state that the fiduciary must discharge his or her duties for the exclusive purpose of providing benefits to participants. ERISA § 404(a)(1)(i), 29 U.S.C. § 1104(a)(1)(i). ERISA's structure has numerous provisions governing when and how benefits will be accrued and paid to participants. *E.g.*, ERISA §§ 105, 203, 204, 205 & 206, 29 U.S.C. §§ 1025, 1053, 1054, 1055 & 1056.

[8](...continued)
Corp., No. 94-3252-C (Mass. Sup. Ct. Sept. 27, 1995), *reported in* (BNA) DAILY LABOR REPORTER No. 197, at A-5 (10/12/95) [$1.2 million award for age discrimination claims]; *Simpson v. Ernst & Young*, No. 1-91-196 (D.C.S. Ohio May 12, 1994), *reported in* (BNA) DAILY LABOR REPORTER No. 92, at A-5 (5/16/94) [$3.7 million award for age discrimination claims]; *Mister v. Ill. Cent. Gulf Rr. Co.*, No. 81-3006 (D.C. S. Ill. August 5, 1993) [$10 million in settlement of race discrimination claims, plus award of $4.8 million in attorneys' fees and expenses).

[9] In contrast, Lockheed concedes that the prohibited transaction rules do not prevent a plan from paying benefits to eligible participants. BRIEF OF LOCKHEED at n. 11.

Finally, in its findings and declaration of policy, Congress wanted ERISA to protect the interests of participants by requiring plans to pay benefits to employees who had worked for significant periods of time. ERISA § 2(c), 29 U.S.C. § 1001(c). In 1986, Congress affirmed its initial findings and declarations by stating that it wanted ERISA to increase the likelihood that participants will receive their full benefits. ERISA § 2b(c)(3), 29 U.S.C. § 1001b(c)(3). Consequently, to read ERISA § 406(a)(1)(D) as prohibiting payment of benefits to participants would make a mockery of ERISA's language, structure and purposes.

Such a reading would also ignore the employment paradigm of which Congress and this Court is well aware. The value employers receive from establishing pension plans is the purchase of labor from employees with the employer's total compensation package. It is impossible to definitely determine what portion of the employee's labor, and hence the value to the employer, is attributable to the pension benefit alone. *Cf. International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 560 (1978) ("Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole . . . "). The value an employer receives from these benefits fl ws from the employment paradigm, and is intangible and nonquantifiable, at best.

While Lockheed concedes that the prohibited transaction rules do not prevent a plan from paying benefits to eligible participants, BRIEF OF LOCKHEED at n. 11, Lockheed analyzes ERISA to permit a plan sponsor to establish any eligibility provisions for receipt of benefits, whether or not the provisions comport with ERISA's fiduciary requirements.[10] Under

[10] Lockheed and *amicus* Chamber of Commerce attempt to distinguish between Parts 2 and 4 of ERISA's Title I, suggesting that Congress chose to regulate the settlor function solely through the rules of Part 2 concerning participation and vesting. BRIEF OF LOCKHEED at 13; BRIEF OF AMICUS CHAMBER OF COMMERCE at 14 -15. However, Part 4 concerning fiduciary responsibility also (continued...)

Lockheed's analysis a plan provision would not violate ERISA if, for example, a plan required a participant to pay the plan sponsor $1,000 in order to receive a benefit. Lockheed would argue that such payment is simply an eligibility requirement to receive a benefit.

This is a nonsensical reading of the statute. Clearly, such a payment would be a prohibited transaction. AARP fails to see the difference between paying $1,000 to the plan sponsor for a benefit and executing a waiver releasing claims against the employer which could cost the employee, and protect the employer from, millions of dollars in employment-related claims. Indeed, the receipt of plan benefits are contingent upon the signing of the waivers which relieve an employer for liability of violations of statutes that govern the workplace.[11] A release of employment claims does not encompass any part of the labor which the employer and employee contemplated would be purchased by the compensation package. Thus, the value of the waivers to Lockheed goes well beyond any benefit it receives under the employment paradigm. Accordingly, an employee's release of potential employment claims for receipt of enhanced pension benefits is a transaction with plan assets for the benefit of Lockheed, a party in interest, and violates ERISA § 406(a)(1)(D).

Although this is a strict reading of the prohibited

[10](...continued)
regulates the settlor function through its rules such as the requirement of written documents and a trust for the establishment of an employee benefit plan. ERISA §§ 402(a)(1) & 403(a), 29 U.S.C. §§ 1102(a)(1) & 1103(a).

[11] "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995).

transaction rules, Congress provided a mechanism to deal with the severity of these rules. To the extent that a fiduciary can meet the standards of ERISA § 408(a), an administrative exemption can be granted.[12] In this case, however, AARP submits that such an exemption can never be found to be in the interests of the participants and beneficiaries because of the significant cost imposed on participants in executing the waivers.

Accordingly, Lockheed's plan provision requiring that employees execute waivers releasing all employment-related claims against it in order to receive pension benefits is a prohibited transaction, and violates ERISA § 406(a)(1)(D).

B. Lockheed is a Fiduciary with Liability for the Prohibited Transaction.

1. Lockheed is a Named Fiduciary Under the Plan.

ERISA requires that a plan set forth named fiduciaries so that responsibility for managing and operating the plan and liability for its mismanagement are established with a degree of certainty. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). *See* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075-78, 5081 n.3; 29 C.F.R. § 2509.75-5, FR-1. A named fiduciary has the authority to control and manage the operation and administration of the plan and must be named in the plan instrument. ERISA §§ 402(a)(1) & (2), 29 U.S.C. §§ 1102(a)(1) & (2).

The Lockheed pension plan explicitly identifies Lockheed Corporation not only as Plan Sponsor, but also as a named fiduciary, JA 45, that has "the authority and responsibility for the design of the Plan and Trust Agreement, including amendments of the Plan and Trust Agreement; . . . " JA 46. *See also* BRIEF

[12] The exemption must be administratively feasible, in the interests of the participants, and protective of the rights of the plan participants. ERISA § 408(a), 29 U.S.C. § 1108(a).

OF LOCKHEED at n. 7. For these reasons, Lockheed, by the express terms of its plan, is clearly a fiduciary under ERISA § 3(21) when it engages in plan design and amendment, and is liable for the prohibited transaction under ERISA § 406(a)(1)(D).

2. Lockheed Is a Fiduciary By Implementing The Waivers.

Alternatively, Lockheed is a fiduciary by its implementation of the waivers. *See Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954, *22-23 (March 19, 1996) (fiduciary administration is to perform duties imposed, or exercise the powers conferred, by the trust documents including the implicit conferring of "such powers as are necessary or appropriate for the carrying out of the purposes of the trust"). By the express terms of the amendment, Lockheed was to draft the participant election form, notify participants of their termination date, notify the pension plan which participants had signed the waiver and draft the release itself. JA 50-51, 54-55. Accordingly, Lockheed clearly became a fiduciary by causing the plan to engage in the prohibited transaction through these administrative actions which the plan would normally perform, and is liable for the prohibited transaction. *See Varity Corp. v. Howe, supra.*

3. Lockheed is a Fiduciary Under ERISA § 3(21) By Amending the Plan.

When looking at the plan provision at issue, one thing is apparent: Lockheed is on all sides of the transaction. Lockheed is the plan sponsor, and it passed the plan provision. Lockheed appoints the Retirement Plan Committee comprised of Lockheed senior officers and employees. Lockheed is the party in interest in the transaction. Clearly, the only party to have complete control and discretion over this transaction is Lockheed.

Lockheed and its *amici* rely on this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. —, 115 S. Ct. 1223 (1995), for the proposition that a plan sponsor has the right to amend or terminate a plan. However, nothing in *Curtiss-Wright* suggests that a plan sponsor has an unfettered right to

amend a plan if the plan provision violates ERISA.

Indeed, such a statement would have been contrary to this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982), stating that "[t]he substantive terms . . . of employee benefit plans must comply with the detailed and comprehensive standards of ERISA." A holding that Lockheed is not responsible for the passage of this illegal amendment leads to the incongruous result that a plan sponsor can, without impunity, pass a plan provision which violates any part of Title I of ERISA, but the plan's implementation of the provision would violate ERISA. This holding would permit Lockheed to hide behind the plan settlor function to impose conditions that will benefit only itself, even though its fingerprints are all over the transaction. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075-78, 5081 n.3. The Ninth Circuit properly rejected this sophistry. JA 89.

Accordingly, AARP submits that a plan sponsor acts as a fiduciary when it passes a plan provision violating ERISA's rules because the provision involves the sponsor's exercise of discretionary authority or control respecting plan administration. 29 U.S.C. § 1002(21)(A). *Cf. ACTWU v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988)(settlor functions may constitute a viable claim in the context of fiduciary breaches).

III. OBRA 1986's BROAD PROHIBITION OF AGE DISCRIMINATION IN PENSION PLANS REQUIRES OLDER WORKERS WHO RETIRE AFTER JANUARY 1, 1988 TO RECEIVE PENSION CREDIT FOR ALL PRE-ACT YEARS OF SERVICE.

"[T]he overall objective of [OBRA's pension] provisions [is] to assure that employee benefit plans do not discriminate on the basis of age." H.R. REP. NO. 99-1012, 99th Cong., 2d Sess. 379

(1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024.[13] Prior to the enactment of OBRA 1986, two groups of older workers were discriminated against in pension plans. The first group -- employees who were hired within five years of their employer's normal retirement age -- were denied any pension credit for their years of service. The second group -- employees who continued to work past their employer's normal retirement age -- were denied additional pension credit after reaching their plan's normal retirement age. In both instances, the employees were denied pension credit for their years of service solely on account of their age. Congress enacted OBRA 1986 to eliminate both types of age discrimination.

The second issue before the Court involves Spink's claim that Lockheed violated OBRA 1986 by reducing his benefit accrual when he retired in 1990 based on a formula that used his age at hire to deny him credit for nine years of service. Specifically, Spink alleges violations of OBRA §§ 9201 and 9202, which amended the ADEA and ERISA to prohibit a reduction of the rate of an employee's benefit accrual because of age. OBRA § 9204(a)(1) applies these amendments to "employees who have 1 hour of service in any plan year" beginning on or after January 1, 1988. Since Spink had more than one hour of service after OBRA 1986 took effect, §§ 9201 and 9202 required Lockheed to credit all of his years of service in his final benefit accrual and prohibited it from using his age at hire to disregard years of service.

Lockheed points the Court to OBRA § 9203 which repealed ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2),[14] and

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[13] OBRA 1986 amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the Internal Revenue Code (IRC), 26 U.S.C. § 1 *et seq.*, to prohibit age discrimination in pension plans.

[14] Prior to being amended by OBRA 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986), ERISA § 202(a)(2) read:

(continued...)

added a new provision providing for delayed normal retirement dates to accommodate the initial participation of these older employees. Lockheed argues that OBRA § 9203 and its effective date provision, § 9204(b), which applies only to "service performed on or after January 1, 1988," permitted it to disregard Spink's pre-1988 service when calculating his final pension benefits.

AARP submits that the Ninth Circuit correctly held that the language, purpose, and legislative history of OBRA 1986 demonstrate that Congress clearly intended to prohibit employers from using age as a factor to reduce the pension benefits of any employee covered by OBRA 1986. However, AARP also maintains that the Ninth Circuit incorrectly concluded that OBRA 1986 operates retroactively based on this Court's analysis in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). Rather, as explained below, Lockheed engaged in new discriminatory acts subject to OBRA 1986 when it amended its plan in 1990 and denied credited service to Spink and other older employees who had been excluded from participation because of their age at hire.

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[14](...continued)

> No pension plan may exclude from participation employees who have attained a specified age, "unless...such employees begin employment with the employer after they have attained a specified age, which is not more than five years before the normal retirement age under the plan.

29 U.S.C. § 1052(a)(2)(emphasis added). The ADEA did not contain a parallel provision allowing individuals to be excluded from pension plans based on their age at hire. OBRA § 9203 amended ERISA § 202(a)(2) to read: "No pension plan may exclude from participation employees who have attained a specified age.

A. The Plain Language, Purpose, and Legislative History of § 9204(a)(1) Demonstrate that Congress Clearly Intended Inclusion of Pre-1988 Years of Service in Determining Pension Accruals.

In § 9204(a)(1), Congress mandates that OBRA 1986's protection against age discrimination in the accrual of pension benefits applies to all "employees who have 1 hour of service in any plan year [beginning on or after January 1, 1988]." There are two significant features of this effective date provision. First, Congress chose to protect all "employees" with one hour of service, not a more restrictive class such as "participants" or "prior participants." Second, Congress did not include any language that would even suggest that it was limiting the years that may be considered when calculating an employee's final retirement benefit. The only limitation is on the class of individuals who may benefit from OBRA 1986's protection. And again, this class is defined very broadly -- any employee with at least one hour of service in a plan year beginning on or after January 1, 1988. As an employee who continued to work at least one hour into a 1988 plan year, Spink was among the group whom Congress intended to protect and to provide relief.

"In assessing the applicability of ERISA's provisions, it is important to recognize the Act's distinction between 'employees' and 'participants.'" *Stewart v. Nat'l Shopmen Pension Fund*, 563 F. Supp. 773, 777 (D.D.C. 1983), *rev'd on other grounds*, 735 F.2d 1552 (D.C. Cir. 1984). Congress does not use these two terms interchangeably. *Cohen v. Martin's*, 694 F.2d 296, 298 (2d Cir. 1982)("The vesting provisions speak of 'an employees right' to receive pension benefits. . . . Other sections of the statute extend their coverage to plan 'participants'. . . "). For example, ERISA § 204(b)(1)(G) prohibits reducing a "participant's accrued benefit" because of an increase in age or service. 29 U.S.C. § 1054(b)(1)(G)(emphasis added). However, §§ 9201 and 9202 prohibit age discrimination in calculating "an employee's benefit accrual." 29 U.S.C. §§ 623(j)(1)(A) and 1054(b)(1)(H)(i)(emphasis added). The selective use of the term "employee" in these sections and their effective date provision demonstrate Congress' clear intent that they apply broadly to individuals like Spink who continued their employment into a plan year beginning on or after January 1, 1988. Had Congress intended to limit OBRA 1986's protections to those individuals who were "participants" prior to January 1, 1988, it could have done so. It did not. Instead, it chose to extend OBRA's protections to all "employees who have 1 hour of service in any plan year [beginning on or after January 1, 1988]." § 9204(a)(1) (emphasis added).

The second notable feature of OBRA § 9204(a)(1) is the absence of any language limiting its applicability to post-enactment service. Nothing in the language of § 9204(a)(1) even suggests that any years of service may be excluded from consideration when calculating an employee's final retirement benefit. In fact, the legislative history of OBRA 1986 establishes that Congress specifically rejected attempts to exclude service prior to OBRA's effective date.

An earlier version of OBRA 1986 had specifically provided that it would apply only to individuals employed after December 31, 1988 and only to accrual computation periods beginning after December 31, 1986. H.R. Rep. No. 99-1012, 99th Cong. 2d Sess. 377 (1986). The language Congress chose for this earlier version clearly excluded pre-enactment service. However, Congress rejected this proposal in conference. Congress understood the "appropriate and specific language" necessary to exclude pre-1988 service and chose not to include it. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.")

The Conference Committee instead drafted an effective date provision in OBRA § 9204(a)(1) that did not exclude from consideration any years of service for purposes of applying §§ 9201 and 9202. OBRA § 9204(a)(1) must, therefore, be read as requiring inclusion of all pre-1988 years of service when determining an employee's pension benefit pursuant to §§ 9201 and 9202.

Furthermore, when Congress intended to permit a limitation on service, it specified the parameters of such a limitation. OBRA § 9202(a)(1) provides that:

> a plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) . . . a limitation on the <u>number</u> of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

100 Stat. 1975. (emphasis added) By expressly permitting this type of limitation on service and participation in § 9202(a)(1), it can be presumed that Congress did not intend to permit the exclusion of pre-OBRA service in §§ 9201 and 9202. *See Russello v. United States*, 464 U.S. at 23.

B. Interpreting OBRA § 9204(a)(1) To Include Pre-1988 Years Of Service Is Consistent With The Interpretation Of Similar Effective Date Language In Other Legislation Affecting Pension Benefits.

A review of other legislation affecting pension benefits illustrates that Congress uses language similar to that in OBRA § 9204(a)(1) when it intends plans to include pre-act years of service. Conversely, Congress is explicit when it wants to carve out or exclude specific years of service for determining an employee's benefit accruals or vested benefits.

Statutory language comparable to OBRA § 9204(a)(1) demonstrates the language Congress uses when it intends to include pre-effective date service in pension benefit calculations. Section 202 of the Retirement Equity Act, Pub. L. No. 88-397, 98 Stat. 1426 (1984), amended § 411 of the Internal Revenue Code to provide specifically that only years of service before age 18 (instead of age 22) could be disregarded when determining a participant's vested interest in his accrued benefits. Section 303(a)(1) of REA applied the amendments only to "participants who have at least 1 hour of service under the plan on or after the

first day of the first plan year to which the amendments made by this Act apply."

The temporal scope of REA's effective date language is strikingly similar to the language used in § 9204(a)(1) of OBRA 1986. The discussion of the REA amendment in the Senate Finance Committee Report makes clear that years of service completed after the employee attained age 18, but before the effective date of the REA amendments, must be counted when determining the employee's vested interest. REPORT OF THE FINANCE COMMITTEE OF THE U.S. SENATE ON THE RETIREMENT EQUITY ACT OF 1984, S. REP. NO. 98-575 at 8 (August 2, 1984), *reprinted in* 4 U.S.C.C.A.N. 2547, 2554 (1984). ("Under the bill, a plan is not permitted to ignore, for purposes of the minimum vesting requirements, an employee's years of service completed after the employee has attained age 18.")

Congress also used language parallel to OBRA § 9204(a)(1) in § 1113 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, which prescribed minimum vesting standards for pension plans. Section 1113(e) stated that the amendments "apply to plan years beginning after December 31, 1988", § 1131(e)(1), but "not to any employee who does not have 1 hour of service in any plan year to which the amendments made by this section apply." § 1113(e)(3). The Conference Report on the Tax Reform Act made clear that the accelerated vesting schedules were to apply to the participant's entire accrued benefit, <u>including benefits attributable to years of service completed prior to the effective date of December 31, 1988</u>. 132 Cong. Rec. H7709 (daily ed. September 18, 1986)(emphasis added).

In contrast, Congress uses different effective date language when it intends pre-act service to be excluded. For example, § 240(c)(1)(C) of the Tax Equity and Fiscal Responsibility Act of 1982 spells out in detail the years of service excluded when computing the minimum benefits a participant is entitled to under the top-heavy rules of § 416 of the Code ("such year of service was completed in a plan year beginning before January 1, 1984."). Pub. L. No. 97-248, § 240(c)(1)(C), 96 Stat. 324 (1982).

When Congress amended § 410(a)(5) of the Code in REA, it also used language specifically excluding pre-effective date service:

> If, as of the day before the first day of the first plan year to which the amendments made by this Act apply, . . . section 410(a) or 411(a) of the Internal Revenue Code of 1954 (as in effect on the day before the date of enactment of this act) would not require service to be taken into account, nothing in the amendments made by . . . section 202 of this Act shall be construed as requiring such service to be taken into account under section . . . 410(a) or 411(a), as the case may be.

Retirement Equity Act, § 303(a)(2), Pub. L. No. 98-397, 98 Stat. 1426 (1984).

As the above comparison of effective date provisions makes clear, Congress explicitly carves out pre-effective date service in the calculation of pension benefits when that is its intent. Conversely, when Congress intends to recognize such service, it has used language identical to OBRA § 9204(a)(1). Because the Ninth Circuit's interpretation of § 9204(a)(1) supports Congress' intent, it should be affirmed.

C. Including Pre-OBRA Years of Service in a Final Benefit Accrual Does Not Cause the Statute to Have a "Retroactive Effect."

1. The "Events in Suit" – Namely Lockheed's 1990 Plan Amendment and the Calculation of Spink's Accrued Benefit – Occurred After the Effective Date of OBRA 1986.

The threshold inquiry for determining whether a statute operates retroactively as set forth by the Court in *Landgraf v. USI Film Products* is whether the "case implicates a federal statute enacted after the events in suit..." 114 S. Ct. 1483, 1505 (1994). "Whether a particular application is retroactive" will "depend

upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Republic National Bank of Miami v. United States*, 506 U.S. 80, 85 (1992) (Thomas, J. concurring), *quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 857, and n.3 (1990) (Scalia, J., concurring). Thus, the determination of the relevant "event" is critical to the Court's examination of the proper reach of the statute in issue.

The "events" challenged by Spink are Lockheed's 1990 plan amendment and the calculation of his pension benefits at the time of his retirement in 1990. In contrast, Lockheed would pinpoint the relevant "event" as 1979, when Spink was excluded from participating in the plan because he was over age 60 when hired. But Spink's OBRA claim does not arise from Lockheed's action in 1979. Rather, Spink claims that Lockheed's subsequent actions in 1990 constituted new and independent grounds for the OBRA 1986 violation.

Lockheed amended its pension plan in 1990 to expressly deny credited service for "pre-Member service" to those employees who had been hired at age 60 or older prior to 1988.[15] This is the amendment and the denial of benefits based on age that Spink contends violates OBRA 1986. Nothing in OBRA 1986 required Lockheed to exclude pre-participation service from credited service for any employees in the calculation of their benefit accrual. Indeed, Lockheed's 1990 early retirement incentive provided credited service for other employees for years in which they were not participants.

In contrast, Lockheed chose to treat certain older employees differently based solely on their age at hire. Lockheed's actions in 1990 violated the ADEA. As this Court explained in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985):

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[15] The 1990 amendment to the Lockheed Pension Plan at Section 4.04(C)(2) provides: "An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988... shall not receive Credited Service for his pre-Member service."

> [a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free. . . not to provide the benefit at all.

quoting Hishon v. King & Spalding, 467 U.S. 69, 75 (1984).

The "events in suit" here are Spink's claim that Lockheed violated the ADEA's and ERISA's prohibitions against reducing benefit accruals based on age as amended by OBRA 1986. In a claim that a denial of benefits discriminates under the ADEA or violates ERISA, the relevant "event" is the employer's denial of benefits. Indeed, a claim for the unlawful denial of benefits under the ADEA or ERISA does not even accrue until the request for benefits is formally made and finally denied. *See Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 451 (6th Cir. 1992) (ERISA); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989) (ERISA); *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982)(ADEA claim of benefit discrimination accrues only after the claimant's final status and benefit entitlement is determined at retirement); *Equal Employment Opportunity Commission v. Westinghouse Elec. Corp.*, 725 F.2d 211, 219 (3d Cir. 1983)(a denial of benefits does not occur until the employee is eligible to apply and until the claim is denied).

Here, the critical "events" -- the plan amendment denying credited service to Spink and the calculation of his final benefit accrual -- both occurred in 1990 --- four years after OBRA 1986 was enacted and two years after it became effective.

The mere fact that Lockheed's 1990 actions may have also continued or incorporated previous discrimination, even previously "lawful" discrimination, does not insulate those 1990 actions from a challenge that they violate OBRA. A current benefit structure, like a present salary structure, is illegal if it continues a pre-act discriminatory structure. *See Bazemore v. Friday*, 478 U.S. 385 (1986).

The Court's analysis of discrimination in a salary structure in *Bazemore* aptly applies to discrimination in a benefits formula.

In *Bazemore*, plaintiff sued under Title VII to eliminate salary disparities between blacks and whites that had stemmed from a segregated work force that existed prior to the passage of Title VII. The Court "focuse[d] on the present salary structure," ... finding it "illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." 478 U.S. at 397, n.6. Similarly here, Lockheed's 1990 plan amendment continued a discriminatory plan structure that singled out a certain group of older employees for differential treatment and less benefits.[16]

Another example also illustrates the distinction between a focus on current challenging discrimination that incorporates previously lawful actions and a challenge to pre-act discrimination. For years prior to the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000(e)(k) many employers forced female employees to take extended leaves of absence during and after their pregnancies. Many employers also denied service credit to these female employees for the periods of forced leave. In *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), plaintiff challenged her employer's denial of an Early Retirement Opportunity (ERO) benefit, because as a result of a forced pregnancy leave taken in 1972, she was days short of the eligible service needed for the ERO. She argued that Pacific Bell's reliance on a historical leave policy constituted a new act of discrimination in the administration of the ERO and the Ninth Circuit agreed. 940 F.2d at 1327.

Similarly, an examination of the current application of a benefit structure that relied on past events was the focal point in *Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422 (N.D. Ill. 1989). In *Puckett*, the court thoroughly examined the language and purposes of OBRA's 1986 pension accrual and effective date provisions, §§ 9201, 9202 & 9204(a)(1). The court held that

[16] In contrast to *Florida v. Long*, 487 U.S. 223 (1988), where the Court distinguished the continuing violation theory in *Bazemore* from the "payments of benefits based on a retirement that has already occurred," 487 U.S. 223 at 238, the discriminatory acts challenged here are the plan amendment and the denial of benefits upon retirement.

"[A]n employee's benefit amount is calculated with the formula existing at the time of the employee's retirement, not with a formula that existed at the beginning of or during the accrual period." *Id.* at 423. The court reasoned that merely because the benefits "formula includes variables dependent on past events" does not make OBRA 1986 retroactive. 705 F. Supp. at 424. Thus, the court concluded that:

> employees who retire after the effective date of OBRA must receive credit for all years of service, including those prior to the effective date, in determining their benefit...

Id.

2. The "Events in Suit" were Not Completed Until 1990 When Spink Retired.

Under *Landgraf*, if a statute "attaches new legal consequences to events completed before its enactment," *Landgraf*, 114 S. Ct. at 1499, then it operates retroactively. Lockheed's view of a "retroactive effect" misconstrues several fundamental principles about the operation of defined benefit plans. The events determining Spink's final benefit accrual were not completed until he retired in 1990, four years after OBRA was enacted.

OBRA 1986's grant of credit for pre-1988 service to those employees who remain employed beyond January 1, 1988 is consistent with the standard operation of defined benefit plans. A defined benefit plan provides a retirement benefit to employees typically based on a formula consisting of total years of service and final salary. The two events that compose the retirement benefit in a defined benefit plan do not become fixed until the employee retires. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636 n.1 (1990).

During the course of an employee's career, his expectation of the benefit he will receive, and the employer's expectation of the benefit it will pay, change dramatically as their situations

change. Neither the employee's nor the employer's expectations about the retirement benefit become fixed by the employee's status at hire, although that is precisely what Lockheed seeks to do here.

For example, suppose the employee in question had started with a company as a secretary making $15,000 a year. At the time of hire, the employer and employee had an expectation of a fairly limited pension benefit the secretary would receive at retirement based on her low salary. But suppose the secretary rose through the ranks of the company to become a vice-president making $100,000 a year. Her final benefit accrual, based on years of service and her final years' salary (typically the highest or last five years), result in a far greater pension and one that could not have been expected or predicted based on her status at hire. The illustration demonstrates that no employer can reasonably fix its expectations about the ultimate benefit to be paid an employee based on the employee's status, salary, or position at hire. Numerous intervening events can dramatically change the picture.

Other changes, such as intervening laws, swings in the market, and changes in actuarial assumptions can also significantly change the employer's ongoing funding of a defined benefit plan and the benefits ultimately paid to employees upon retirement.[17] When an employee retires, he is paid a benefit in accordance with the benefit accrual formula and the legal requirements in effect at the time of his retirement, even if he had previously accrued benefits on a different basis under different plan formulas. *See Puckett v. United Air Lines, Inc.*, 705 F. Supp. at 433.

The events that determined Spink's benefit accrual were not **completed** until 1990. Thus, OBRA 1986 does not operate retroactively.

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[17] *See* N. Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 AM. J. TAX POLICY 117, 121-22, and n. 19 (1986).

D. Granting Spink and Similarly Situated Individuals Credit for Their Pre-1988 Service Will Not Cripple Private Pension Plans.

Lockheed and its *amici* attempt to persuade this Court that requiring Lockheed and other employers to give older workers credit for their pre-1988 service, will have an immediate and devastating effect on employers and their retirement plans.[18] There is simply no evidence supporting this allegation. Granting employees, who had previously been excluded from participating in their employer's pension plan based on their age, credit for their pre-1988 service will not significantly impact pension plans.

The class of affected individuals is exceedingly small and well-defined. The only individuals impacted are those individuals (a) who began working for an employer before the first day of the pension plan year beginning sometime in 1988; (b) who at the time they were hired were within five years of normal retirement age -- usually age 60;[19] (c) who continued to work at least one day into the 1988 plan year; (d) whose employer had a pension plan which excluded such workers from plan participation;[20] and (e) whose pension plan refused to include pre-1988 service in calculating final benefit accruals under the plan.

[18] Because Lockheed's plan is substantially overfunded, JA 10, it is unlikely that any additional contribution would be necessary to pay for the benefit accruals OBRA mandates.

[19] This factor alone significantly reduces the scope of the affected group. Employees age 60 and older face incredible obstacles in finding employment. Department of Labor, LABOR MARKET PROBLEMS OF OLDER WORKERS 59 (1989).

[20] The "Age 60 Exclusion" "was not a majority practice" of defined benefit plans. *Spink v. Lockheed, Part II: The OBRA 1986 Interpretation*, 4 ERISA LITIGATION REPORTER 22 (1995). The Chamber of Commerce of the United States of America, as *amici* for Lockheed, estimates that only 37 percent of defined benefit plans took advantage of the exclusion. BRIEF at 28.

In enacting OBRA 1986, Congress was aware of the potential cost plans would incur by including pre-OBRA service for the much larger group of employees who worked beyond normal retirement age. In a comprehensive study of the cost of requiring employers to continue pension contributions to this larger group, of which Spink and employees are a small subset, Congress found that it "would not significantly affect total U.S. pension costs.[21] Contributions to pension funds would increase by less than 1 percent. . ." STAFF OF SENATE SPECIAL COMMITTEE ON AGING, 99th Cong., 2d Sess., THE COST OF MANDATING PENSION ACCRUALS FOR OLDER WORKERS iv (Comm. Print 1986). By enacting OBRA 1986 with knowledge of its potential financial impact, Congress demonstrated its belief that the benefits associated with eliminating age discrimination in pension plans outweighed the minimal cost associated with doing so.

[21] While the impact on plans would be insignificant, requiring credit for all years of service would provide the small group of affected individuals substantially more valuable retirement benefits.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the decision of the Ninth Circuit be affirmed.

Respectfully submitted,

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Lockheed's Purchase of General Releases from its Employees With Pension Plan Assets Violates ERISA Section 406 3

A. Assets Held in Trust for the Exclusive Benefit of Employees and their Families May Not Be Conditioned on the Delivery of Valuable Extra Consideration to the Employer Beyond an Employee's Labor or Retirement 8

B. Lockheed's Amendment of the Plan to Dispose of Plan Assets Conditioned on Receipt of Valuable Consideration for its Own Account Violated ERISA's Prohibited Transaction Rule 12

C. It Is Illegal Through a Plan Amendment, or Its Implementation, to Dispose of Trust Assets Conditioned on Additional Consideration for a Party-in-Interest 18

II. The Reduction of Spink's Benefit Accruals Violates the Rule in OBRA Sections 9201 and 9202 Against Limiting the Years of Service or Participation Taken into Account in Determining Pension Benefit Accrual on the

Basis of an Employee's Attainment of Any Age 21

A. Lockheed's Refusal to Credit Pre-December 25, 1988 Service to Spink Violates the OBRA Rules on Limiting Accrual Credits Based on Age 23

B. Lockheed's Defense Would Remove the Protection in OBRA Sections 9201 and 9202 Against Limiting Accrual Credits on the Basis of Age 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

ACTWU v. Murdock, 861 F.2d 1406 (9th Cir. 1988) 15

Beck v. Levering, 947 F.2d 639 (2d Cir. 1991) 9

Brock v. Hendershott, 8 EB Cas. 1121 (S.D. Ohio 1987), affd, 840 F.2d 339 (6th Cir. 1988) 14

Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985) 17

Commissioner v. Consolidated Industrial, 113 S. Ct. 2006 (1993) 9

Curtiss-Wright v. Schoonejongen, 115 S. Ct. 1223 (1995) 13

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979) 9, 12

Davidson v. Canteen Corp., 957 F.2d 1404 (7th Cir. 1992) 26

Delgrosso v. Spang & Co., 769 F.2d 928 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) 14

Eaves v. Penn, 587 F.2d 453 and 458 (10th Cir. 1978) . . 15

Elser v. Machinists National Pension Fund, 684 F.2d 648 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983) 17

Foulke v. Bethlehem 1980 Salaried Pension Plan, 565 F. Supp. 882 (E.D. Pa. 1983) 14

Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) 12

In re Gulf Pension Litigation, 764 F. Supp. 1149 (S.D. Tex. 1991) 15

Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836 (4th Cir. 1974) 15

Hickerson v. Velsicol Chemical Corp., 778 F.2d 365 (7th Cir. 1985), cert. denied, 479 U.S. 815 (1986) 14

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) 16

Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) 3

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 16

Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995) 14

Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) . . 24

Lowen v. Tower Asset Mgmnt, Inc., 829 F.2d 1209 (2d Cir. 1987) 12

M&R Investment Co. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982) 9

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 9

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989) 15

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 10

Struble v. New Jersey Brewery Employees Welfare Fund, 732 F.2d 325 (3d Cir. 1984) 14

Varity Corp. v. Howe, 64 U.S.L.W. 4138 (March 19, 1996) 11, 19

Werschkull v. United Cal. Bank, 149 Cal. Rptr. 829 (Cal. App. 1978) 15

FEDERAL STATUTES

ERISA Section 2(b), 29 U.S.C. §1001(b) 11

ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) 13

ERISA Section 3(39), 29 U.S.C. § 1002(39) 22

ERISA Section 3(14), 29 U.S.C. § 1002(14) 7

ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B) . 26

ERISA Section 403(c), 29 U.S.C. § 1103(c) 6

ERISA Sections 405(a) and (c)(2)(B), 29 U.S.C. §§1105(a) and (c)(2)(B) 17, 18

ERISA Section 406, 29 U.S.C. § 1106 . . . . . *passim*

ERISA Section 408, 29 U.S.C. § 1108 6

FEDERAL REGULATIONS

26 C.F.R. 1.401(a)(4)-4(b)(2)(ii)(B) (1995) 8

29 C.F.R. 1625.10(c) 21

58 Fed. Reg. 46,773, 46,778 (September 3, 1993) 8

Rev. Rul. 78-252, 1978-1 C.B. 123 . . . . . 26, 27

I.R.S. Notice 88-126, 1988-2 C.B. 538 25

LEGISLATIVE HISTORY

H. Conf. Rep. 1012, 99th Cong., 2d Sess., 382,

reprinted in 1986 U.S.C.C.A.N. 4019, 4027 30

H. Conf. Rep. 1280, 93d Cong. 2d Sess., 275, 3 ERISA Leg. Hist. 4541 26

132 Cong. Rec. S13176 (September 19, 1986) 30

2 ERISA Leg. Hist. 1605 (floor statement of Senator Harrison Williams) 3

2 ERISA Leg. Hist. 1609 (floor statement of Senator Jacob Javits) 3

BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2,000 attorneys who specialize in representing individuals in controversies arising from the workplace. It is the country's only professional membership organization of lawyers who represent employees in employee benefits, employment discrimination, wrongful discharge and other employment-related cases.

NELA has devoted its efforts to supporting precedent-setting litigation and legislation affecting the rights of individuals in the workplace. NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefit claims. NELA is qualified to brief this Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving ERISA and other employment laws, including *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (March 19, 1996), *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).[1]

SUMMARY OF ARGUMENT

Paul Spink worked for Lockheed Corporation from 1979

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[1] The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

to 1990. Lockheed informed him in 1984 that it had excluded him from participation in the employees' pension plan because he was over age 60 at the time he was hired. JA 78. In 1986, Congress enacted the Omnibus Budget Reconciliation Act which, in pertinent part, prohibited businesses from excluding employees from pension plan participation based on their age. Lockheed complied with that part of the law, but when Spink retired it limited the years of service used in computing his benefit accruals to his service after December 25, 1988. In 1990, shortly before he retired, Lockheed offered Spink and other older employees an extra three years of credited service for benefit accruals under a retirement incentive program, but it conditioned the offer on a signed general release in favor of Lockheed of all employment litigation claims that the employee might possess, including ADEA and ERISA claims. Spink refused to sign the waiver and this litigation ensued.

Lockheed's purchase of general releases from employees using pension plan assets held in trust exclusively to provide benefits to participants and beneficiaries violates ERISA's Section 406's prohibited transaction rule. ERISA does not allow "parties-in-interest," which include the company, company officers, other fiduciaries, union officials, or relatives or affiliates of the above, to extract extra consideration from employees as part of the price to receive plan assets that are held in trust.

The 1986 OBRA amendments were enacted to stop discrimination on the basis of age under company pension plans. Lockheed's reduction of Spink's benefit accruals on account of his attainment of age 60 before Lockheed hired him violates the rule in OBRA Sections 9201 and 9202 against imposing a limit on "the number of years of service or years of participation

which are taken into account for purposes of determining benefit accrual under the plan" based on the employee's attainment of any age.

ARGUMENT

I. Lockheed's Purchase of General Releases from its Employees With Pension Plan Assets Violates ERISA Section 406

In enacting ERISA, Congress treated pensions as deferred wages that the employee earns with his or her labor.[2] As the Chamber of Commerce recognizes, the theory that employers paid pensions and fringe benefits as gratuities was rejected even before ERISA. *See Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) and, e.g., ABA Section of Labor and Employment Law, *Employee Benefits Law*, xxi and 249 (BNA 1991).

As a result, everyone now agrees that businesses receive valuable consideration from the labor that employees offer in order to earn pension benefits and that businesses, in certain instances, receive, or perceive that they receive, benefits from voluntary terminations of employment through retirement.

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[2] *See, e.g.*, 2 ERISA Leg. Hist. 1605 (floor statement of Senator Harrison Williams, the chief Senate Democratic sponsor of ERISA: "pensions are not gratuities, like a gold watch bestowed as a gift by the employer on retirement. They represent savings which the worked has earned in the form of deferred payment for his labors"); 2 ERISA Leg. Hist. 1609 (floor statement of Senator Jacob Javits, the chief Senate Republican sponsor: "The private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary").

Service for the employer and retirement from the employer's service are the incidents of employment that an employer obtains in exchange for pension benefits under ERISA plans. *See* Dan M. McGill, *Fundamentals of Private Pensions* (5th ed.) at 19-20 (pensions are deferred wages for employee's labor; pension plans also permit employers to encourage older employees to retire in orderly fashion).[3] The question here is: "Can an ERISA plan require additional, non-incidental consideration from the employee running in favor of the employer in exchange for the payment of benefits with trust assets without violating ERISA's prohibited transaction rule?"[4]

The facts here show a self-interested exercise of authority over the disposition of pension plan assets to obtain valuable consideration for an employer: Lockheed dictated that the use of trust assets to pay extra benefits be conditioned on the employee's execution of a general release running in its favor. The increased pension benefit that Lockheed offered Spink if he executed the general release was about $120 per month.[5] For an

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[3] In law, an "incident" may be defined as something directly and immediately relating to something else. *Webster's Third International Dictionary* (1993 ed.).

[4] If ERISA Section 406 did not prohibit these transactions, the Ninth Circuit would on remand need to examine alternative arguments that the transactions are (a) in breach of the fiduciary duty to act solely for participants and beneficiaries, (b) cause plan assets to inure to the benefit of the employer, and (c) unlawfully condition the receipt of vested benefits in violation of ERISA. The Solicitor General recognizes that the receipt of vested normal retirement benefits may not be conditioned on a release. SG Br. at 21 n.14. The benefits at issue here are vested retirement benefits. See JA 51 and 56.

[5] Three extra years of pension credit x 1-1/2% x ~$33,000 "excess base rate of pay" salary ÷ 12 months ≈ $120 month.

employee like Spink who was age 72, this was worth about $10,000. As the Ninth Circuit found, Lockheed was, in effect, offering to "writ[e] checks drawn on pension funds to buy the releases in question" for itself. JA 90.[6]

Lockheed implicitly asserts that the consideration required for an employee to obtain plan benefits can never constitute a prohibited exchange or use of plan assets under ERISA, even if the consideration is valuable non-incidental consideration that goes to an employer or another party-in-interest. This proposition would permit plans to impose any extraneous conditions on plan benefits that employers want for their own account. Under Lockheed's position, employers could condition pension benefits on releases, with costs and penalties for any breaches, of not just sex, race and age discrimination claims, but assault, defamation, harassment and other tort claims. Pension benefits could also be conditioned on waiver of contract claims, including stock option and other benefit claims, on releases of copyright and patent claims, on post-employment trade and business secrecy agreements, on payment of any charges that are outstanding against the employee at the time of retirement, such as for work uniforms and tools, travel expenses, employee contributions to non-ERISA plans, or extensions of credit from other departments. Pension benefits could also be

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[6] One of Lockheed's amici also describes the transaction vividly: The "employer buys a litigation-free future in exchange for awarding substantial extra benefits to employees." EEAC Br. at 16.

Lawfulness aside, it is, of course, easier for Lockheed to purchase general releases with someone else's money, including money held in trust. No one questions Lockheed's right to purchase general releases with its own money, including with severance benefits funded with corporate assets.

conditioned on paying fees to the employer, or even on lending money to financially-strapped employers. Employers could also condition pensions on uncompensated off-hours work. The list would be virtually endless. Under Lockheed's argument, the conditions would not even need to be consistent: Groups of favored employees could receive their pension benefits with few conditions while groups of less favored employees could face the entire gamut of conditions. Lockheed's position seeks to pull pension plans back to the time when pensions were treated as gratuities that employers could condition in any manner and withhold at their discretion.

Lockheed's position cannot withstand review for compliance with ERISA. To insulate trust assets that are to fund pensions from misuse by employers, Congress provided that assets held in trust are to be used for the exclusive purpose of providing benefits to participants and beneficiaries and it prohibited transactions with trust assets that exchange, transfer or use plan assets for the benefit of the employer and certain other parties-in-interest. ERISA's exclusive purpose rule, its anti-inurement rule in ERISA Section 403(c) and the prohibited transaction rule all prevent the use of trust assets for other purposes. To alleviate the prohibited transaction rule's impact where appropriate, Congress enacted specific exemptions to allow benefits to be paid to fiduciaries and other parties-in-interest under ordinary conditions. For example, ERISA Section 408(c) exempts a fiduciary's receipt of a pension benefit from the plan, provided that the benefit is "computed and paid on a basis which is consistent with the terms of the plan as applied to all other employees." Under Section 408(a), the Secretary of Labor has authority to grant class and individual exemptions that are "administratively feasible," "protective of

the rights of participants and beneficiaries of the plan," and in their interests. But if all conditions on the payment of benefits were exempt, as Lockheed contends, a bazaar of individual and small group exchanges would substitute for the statutory exchange of labor and retirement for pensions.

The proposition that Lockheed asserts is also belied by the absence of any distinction in ERISA Sections 3(14) and 406, 29 U.S.C. §§ 1002(14) and 1106, between a "party-in-interest" employer like Lockheed, on the one hand, and other "parties in interest." Certainly, Lockheed would not contend that it is permissible under ERISA Section 406 to require employees, in exchange for receiving benefit payments from trust assets, to deliver valuable consideration to one of the Lockheed-selected fiduciaries who are charged with administering the plan, to one of Lockheed's chief executives, to a union official whose members are covered by the plan, or to a relative or affiliate of any of these persons or entities. The statutory text does not distinguish Lockheed and make it eligible to receive consideration that these other parties in interest are prohibited from receiving.

The Solicitor General proposes a largely more favorable standard in terms of protecting employees from Lockheed's attempt to obtain extra consideration for itself from assets held in trust for the employees. But the Solicitor General's standard would still unnecessarily and unpredictably allow employers to obtain consideration that is not an incident of service or termination of the employment relationship. Whether a condition departs "substantially" from the "paradigm" of pensions in exchange for the employee's service and retirement (Br. at 16-17) is an unnecessarily lax and unpredictable test. The Solicitor seems to have been attracted to a position that

allows some departures from the rule because the IRS previously ruled that a non-compete clause does not violate certain tax-qualification rules. However, the IRS did not address the issue of whether this additional consideration constituted a prohibited transaction.[7] The fault with the Solicitor's proposed standard becomes more apparent when the Solicitor announces, several sentences later, a willingness to permit employers to require employees to waive their ADEA claims in exchange for pension benefits, while holding firm on the waiver of race and sex discrimination and common law tort claims. Br. at 24-25. There is no support or rationale for these breaks in the Solicitor's standard.[8]

A. Assets Held in Trust for the Exclusive Benefit of Employees and their Families May Not Be Conditioned on the Delivery of Valuable Extra Consideration to the Employer Beyond an Employee's Labor or Retirement

NELA's position is that ERISA does not permit an employer to take trust assets and exchange them for anything other than service or retirement - the natural incidents of pension plans. NELA's position leaves the prohibited transaction rule with the broad sweep that Congress intended: The "crucible of congressional concern" in enacting ERISA was "the misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Congress intended to ensure that trust assets are used for the exclusive benefit of the plan's participants and it designed a *per se* rule to prevent the use of trust assets for the benefit of the plan sponsor or other parties in interest. See *Commissioner v. Consol. Industrial*, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan"); *Cutaiar v. Marshall*, 590 F.2d 523, 529-30 (3d Cir. 1979) (§ 406(a) is designed to prevent transactions for the benefit of parties-in interest that offer a high potential for abuse of a trust assets); *M&R Investment Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (the transactions in § 406(a) are transactions with plan assets that may not be at arm's length; the statute presumes such transactions are not for the plan's exclusive benefit); *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) (transactions in § 406(a) are per se violations of ERISA regardless of the motivation that caused the transaction to be initiated, the prudence of the transaction, or the absence of any harm from it).

Once an employer contributes money to a pension plan, the assets are to be held in trust exclusively for the benefit of the participants and beneficiaries. Use of plan assets for the benefit of parties-in-interest is prohibited. It should be emphasized that the prohibited transaction rule violation in cases like this does not arise from the payment of benefits to the participants. It arises because the benefits are conditioned on the delivery of

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[7] *See, e.g.*, 58 Fed Reg. 46,773, 46,778 (September 3, 1993) (compliance with nondiscrimination regulation does not assure compliance with Title I of ERISA).

[8] Lockheed's, the Solicitor General's, and amicus ERIC's briefs all sound as though the IRS has permitted ADEA waivers as a condition under early retirement windows. Lockheed Br. at 28; SG Br. at 22 n.15; ERIC Br. at 21 n.18. The mention of waivers is, however, in connection with an unrelated test on the "current availability" of a benefit to non-highly compensated employees. 26 C.F.R. 1.401(a)(4)-4(b)(2)(ii)(B) (1995). Even if the citation can be read to imply that IRS is aware that some employers have done this, IRS non-discrimination rulings do not affect ERISA Title I, as the IRS states.

consideration, other than labor and retirement, in favor of the party-in-interest employer. The extraneous conditions cause plan assets to be exchanged not for the employee's labor and retirement but for other consideration going to the employer's account. Use of the assets to extract valuable consideration for the employer and other parties-in-interest violates the prohibited transaction rule.[9]

The exemptions in ERISA Section 408 are designed to alleviate the prohibited transaction rule's sweep where appropriate. As already discussed, the prohibited transaction rule does not prohibit the exchange of assets for labor or retirement consistent with the terms of the plan as applied to all participants and beneficiaries. If additional leavening is needed, the Department of Labor is given authority under ERISA Section 408(a) to adopt class and individual exemptions under the standards cited above.[10]

Since ERISA was enacted, business associations have gone to Congress several times asking Congress to eliminate or modify the prohibited transaction rule, contending that its *per se* nature encompasses many beneficial transactions. They contend that the statutory exemptions are too narrow and that going to the Department of Labor for exemptions is cumbersome. *See, e.g*, Hearing on S. 1541 Before Senate Subcommittee on Labor, January 26, 1982. To date, Congress has not responded with

[9] *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981) ("fiduciary requirements of ERISA ... specifically insulate the trust from the employer's interest").

[10] The Labor Department has issued several class exemptions allowing employers limited financial benefits in plan transactions. *See* Donald Myers, *ERISA Class Exemptions* (BNA 1991).

repeal or modification of the rule. This Court should not modify ERISA Section 406(a) through a judicial decision.

Several amici postulate other hypotheticals that they find more difficult than this case. See Chamber of Commerce Br. at 10-11. None of the hypotheticals seem to involve the situation where the plan is amended to demand that the employee/participant transfer additional, non-incidental consideration to a party-in-interest as a condition to receiving plan benefits. While there could always be a future case where it is more difficult to determine whether plan assets are being exchanged for additional, non-incidental consideration to the employer, it should be emphasized that this is not a hard case: Lockheed is effectively "writing checks drawn on pension funds to buy the releases in question." JA 90.

A holding for Lockheed would allow employers to attach any manner of new conditions to the payment of pension benefits, as illustrated above, with the consideration flowing to the settlor/employer. In any irrevocable trust, however, trading trust assets for something of value for a party-in-interest is a breach of trust, however understandable the party-in-interest's motives are. One cannot place assets in an irrevocable trust for an estate's tenants and later add conditions to the receipt of trust assets to extract their agreement not to challenge the settlor's rents or sue the settlor for personal injuries. *See* Bogert, *Trusts* (6th ed.) §§ 145 and 148. If pension assets held in trust can be used on behalf of the employer/settlor to liquidate statutory and common law causes of action (with penalties for violating the waiver), ERISA will be pushed far from its purpose of protecting the interests of participants in employee benefit plans by establishing standards of conduct, responsibility and obligation for fiduciaries of such plans. ERISA Section 2(b), 29 U.S.C. §

1001(b); *Varity Corp. v. Howe*, *supra*, 64 U.S.L.W. at 4140.

B. Lockheed's Amendment of the Plan to Dispose of Plan Assets Conditioned on Receipt of Valuable Consideration for its Own Account Violated ERISA's Prohibited Transaction Rule

Over the last 20 years, the lower courts have strictly enforced ERISA's prohibited transaction rules to prevent their "erosion," *Lowen v. Tower Asset Mgmnt, Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987), notwithstanding presentations by defendants of unobjectionable aspects to the transactions. The most common prohibited transaction is probably a loan of plan assets to a financially-strapped employer. In many cases, the employer argues that the loan appeared to be a good investment for the pension plan and that it was the only way to save jobs and, ultimately, the pension plan. But the prohibited transaction rule says that the use of plan assets for the employer's benefit is prohibited unless an exemption specifically permits it. *See, e.g.*, *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979). In other cases, the transaction may be to transfer surplus pension assets to shore up a faltering health plan. But the courts have held that ERISA prohibits such transactions. *See Cutaiar v. Marshall*, *supra*. Virtually all of the prohibited transaction cases decided in the past 20 years would be effectively eliminated if employers could just adopt amendments directing the fiduciaries to engage in the prohibited transaction and thereby avoid the statutory rule. Following the logic of Lockheed's argument, the employer could, for example, simply adopt an amendment directing a fiduciary to lend the money to the employer.

The Solicitor General argues that Lockheed's action in

adopting the general release amendment is a non-fiduciary function, while the action of implementing the amendment is clearly a fiduciary one. NELA agrees with the second part of the Solicitor's position. But while the first part may not ultimately affect the outcome of this case,[11] NELA disagrees with it. This Court has never held that an employer who adopts an amendment directing a violation of ERISA can, under no circumstances, violate a fiduciary duty. It should not do so now. All of the cases cited by Lockheed and its amici for the proposition that amendments are not breaches of fiduciary duty deal with amendments that do not violate ERISA and do not exchange trust assets for extraneous consideration for the employer. In *Curtiss-Wright v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995), this Court said that an amendment is "generally" not a fiduciary function, but the Court did not address the situation where the amendment violates law.

NELA's position is that when an employer dictates fiduciary administration and disposition of trust assets through an amendment it is functioning as a fiduciary and is subject to liability as such. ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), provides that a person is a fiduciary with respect to a plan to the extent it exercises any authority or control

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[11] Even if this Court held that Lockheed is never a fiduciary in amending the plan, Lockheed is responsible under ERISA because (a) it functioned as a fiduciary in implementing the plan provisions (see note 12), and (b) even if the members of its retirement committee had performed all implementation functions, Lockheed would be subject to equitable relief as the party-in-interest who received consideration in the prohibited exchange (SG Br. at 5, n.2).

respecting management or disposition of the plan's assets.[12] Many circuit decisions, which have not been cited by Lockheed or the Solicitor General, have held that amendments disposing of plan assets in the interest of an employer or another party-in-interest are exercises of fiduciary authority under ERISA. These decisions should not be ignored. See *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984) (management trustees who voted for plan amendment giving trust assets to contributing employers rather than using them for participants breached fiduciary duty); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 938 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (employer amendment of pension plan to take reversion of assets breached fiduciary duty when amendment exceeded employer's authority under collective-bargaining agreement); *Brock v. Hendershott*, 8 EB Cas. 1121, 1122-23 (S.D. Ohio 1987), *aff'd*, 840 F.2d 339 (6th Cir. 1988) (adoption of plan provision requiring employees to go to dental service provider in which union officials owned interest was breach of fiduciary duty because it dealt with plan

[12] Case law also recognizes that an employer may function as a fiduciary administering the plan by taking actions that supplant the functions of an employer-selected and controlled committee of fiduciaries. *E.g.*, *Foulke v. Bethlehem 1980 Salaried Pension Plan*, 565 F. Supp. 882, 883 (E.D. Pa. 1983) (if corporate employer has functional role, along with retirement committee, in administration, both are fiduciaries); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995) (corporation may have supplanted committee in selecting annuity carrier).

In this case, the Plan document expressly provided that Lockheed, and not the members of the Committee, would perform the administrative functions connected with the general release condition to benefit payments, including drafting the release with terms "acceptable to the employer." JA 50.

assets for their benefit); *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 377 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) (employer had fiduciary duty in amending profit-sharing plan not to engage in "self-interested plan administration" and therefore had duty not to impair value of participants' accounts and not to use money for its own interests); *ACTWU v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (amendment redirecting surplus assets as part of greenmail scheme may violate ERISA Section 406 because it uses plan assets to further interests other than those of participants); *Eaves v. Penn*, 587 F.2d 453, 455 and 458 (10th Cir. 1978) (amendment that converted profit-sharing plan to ESOP violated employer's fiduciary duty by diverting existing plan assets for employer's benefit).[13]

Even some of the decisions on which Lockheed relies recognize that while in the cases before them the employers did not have fiduciary duties, employers may have such duties when adopting amendments that dispose of existing plan assets for the employers' own account: *See Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S.

[13] *See also In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1208-10 (S.D. Tex. 1991) (amendment transferring plan assets to a pension plan to be established by purchaser of division with reimbursement to seller rather than plan if asset transfer exceeded a certain amount was prohibited transaction); *Werschkull v. United Cal. Bank*, 149 Cal. Rptr. 829 (Cal. App. 1978) (amendment shifting excess assets to another plan of employer breached state law fiduciary duty).

The same view existed at the time ERISA was enacted. *E.g.*, *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 843 (4th Cir. 1974) (power to "modify" a pension plan gives employer "ultimate control over how the Program monies will be managed and disposed of").

1020 (1989) ("when, as here ... there is normally no plan asset pool to be affected ... the company normally acts in its role as employer, not in its role as fiduciary; but suggesting that amendments that "affect the allocation of a finite plan asset pool" may be are subject to fiduciary duties); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159 (3d Cir. 1990) ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust"); *Sutton v. Weirton Steel Div. Of National Steel Corp.*, 724 406, 411 (4th Cir. 1983) ("it is the unfunded nature of [the employer's] contingent liability that distinguishes this case from the cases ... where courts have found that fiduciaries have violated § 1106"); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("[i]n general, an employer that decides to ... amend ... a plan does not act as a fiduciary ... provided that ... the amendment does not otherwise violate ERISA or the express terms of the plan").[14]

Lockheed's amendment of the plan in order to use plan assets to obtain general releases for its own benefit is also a breach of fiduciary duty because under the express terms of its pension plan. Lockheed obligated itself to act as a "named fiduciary" when it provided that as a "named fiduciary" it had the "authority and responsibility" for "amendment of the Plan

[14] The Chamber of Commerce exhibits similar unease with the sweeping assertion Lockheed makes. Chamber Br. at 13 n.5 (it is "unnecessary in this case to make the more sweeping assertion that all amendments represent an exercise of the settlor function. ... We leave for another day the question of whether an amendment ... [that] invade[d] the traditional trustee function would likewise be exempt from the fiduciary duties"). *See also* Chamber Br. at 14 (recognizing common law rule that settlor cannot implement trust terms that "run counter to any rule or policy of the law").

and the Trust Agreement." JA 46. The circuit courts have uniformly held when the entity or person who adopts an amendment is obligated to act as a fiduciary when it performs the function of amending the plan, it must be held to that standard. *See, e.g., Elser v. Machinists National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985).

The plan document in this case clearly shows that Lockheed had a fiduciary duty not to violate ERISA when it adopted plan amendments disposing of trust assets. Under the plan document, Lockheed is first designated as a "named fiduciary" with respect to the plan. JA 45. Lockheed's plan then unequivocally provides that Lockheed as the "named fiduciary" has the "authority and responsibility" for "amendment of the Plan and Trust Agreement" and for "qualification of the Plan under applicable law." JA 46; *see also* JA 47-48.[15]

Thus, Lockheed acted as a fiduciary when it adopted the general release condition under the early retirement incentive provisions of the pension plan (as well acting as a fiduciary when it implemented the general release amendment). As such, it "caused" the plan to enter into prohibited transaction in violation of ERISA Section 406(a).[16]

[15] In light of these provisions, Lockheed's categorical representation that "it did not act in a fiduciary capacity when it amended the Plan" to condition benefits on general releases, Br. at 12, is plainly incorrect.

[16] Under ERISA, "named fiduciaries" are responsible if they enable other fiduciaries to commit breaches by failing to comply with ERISA § 404(a)(1). ERISA §§ 405(a) and (c)(2)(B), 29 U.S.C. §§

C. It Is Illegal Through a Plan Amendment, or Its Implementation, to Dispose of Trust Assets Conditioned on Additional Consideration for a Party-in-Interest

It is illegal through a plan amendment or through its administration to use trust assets in a manner that violates ERISA's prohibited transaction rule. An employer cannot avoid the statutory prohibitions by the expediency of adopting an amendment that dictates that another fiduciary implement the prohibited transaction for the employer. The Solicitor General agrees, at least, that it is a prohibited transaction to implement an amendment that uses trust assets for a party in interest's benefit. Lockheed effectively acknowledges this, too: In footnote 11 of its opening brief, Lockheed concedes that a fiduciary's implementation of an amendment that violates ERISA breaches the fiduciary's duty to act consistently with ERISA. Once Lockheed concedes this, the only argument that it can make is that the adoption of this amendment is not a breach of fiduciary duty, while its implementation may be. Ultimately, this hair-splitting gains Lockheed nothing. Even if Lockheed wins with its "settlor" argument, it loses because Lockheed and the members of the Retirement Committee

1105(a) and (c)(2)(B). ERISA § 404(a)(1) provides, in pertinent part, that a fiduciary must discharge its duties consistent with the provisions of ERISA Title I, which includes the ERISA § 406 prohibited transaction rule.

Named fiduciaries must also make reasonable efforts to remedy a breach by another fiduciary of which they have knowledge. *Id.* A named fiduciary cannot therefore adopt a plan amendment directing a violation of ERISA and then stand passively by while another fiduciary implements it.

implemented the general release amendment and "caused" the plan to engage in the prohibited transaction.[17]

Some amici, but notably not Lockheed, argue that the Court should distinguish between the liability of a fiduciary for causing a prohibited transaction and that of a party-in-interest for engaging in the transaction. This issue is not before the Court.[18] The reason Lockheed has not raised it is clear: Lockheed was literally on every side of this transaction (except the employee's). Lockheed was the party-in-interest who received the releases demanded as a condition of receiving the special early retirement benefits. It was the "named fiduciary" who adopted the amendment. It was the "named fiduciary" who selected, and may remove at will, the members of the Retirement Plans Committee who administer the Plan's terms.[19] As mentioned, in this case, Lockheed assigned itself, rather than the members of the Committee, the administrative responsibilities connected with the release condition under the Plan. See n. 12.

The arguments by Lockheed and amici ERIC and EEAC

[17] Indeed, even if the Retirement Committee, and not Lockheed, had handled implementation of the release condition for the plan, ERISA Section 406(a) would be violated because a fiduciary caused the plan to engage in a transaction that delivered non-incidental consideration to Lockheed as a party-in-interest.

[18] As the Solicitor General notes, this issue was not in the petition for certiorari. SG Br. at 5, n.2. *See* Sup. Ct. Rules 14.1(a) and 24.1(a) and, e.g., *Varity Corp. v. Howe*, 64 U.S.L.W. at 4140 (breach of fiduciary duty to workers who were already retired was not fairly within scope of questions Varity posed in its petition).

[19] Lockheed also indemnifies the members of the Retirement Plans Committee whom it selects from any liability for breach of fiduciary duty in implementing plan terms. § 13.05 of Plan.

that Congress enacted the Older Workers Benefit Protection Act (OWBPA) of 1990 to allow employers to obtain general releases without violating the prohibited transaction rule are fanciful. Congress did not take any action in OWBPA to change ERISA Section 406, nor did it discuss in the legislative history allowing trust assets to be used for non-trust purposes. Congress evidently presumed that employers were purchasing releases with assets that were not held in trust for other purposes, as we presume as well.[20]

The threats by Lockheed and its amici that they may stop offering early retirement incentives from pension plan assets held in trust unless they are allowed to condition plan benefits on general releases in the employer's favor, and that litigation will dramatically increase unless they prevail on this issue, are similar to the threats that were heard before ERISA's enactment and with every major case and every employee benefit legislative reform since then (e.g., the 1984 REA, the 1986 Tax Reform Act, and the 1986 OBRA) . In *Varity Corp. v. Howe*, the defendant and some of its amici pictured a dramatic increase in plan costs and litigation in practically the same language as used in this case.

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[20] Petitioner offers no statistical evidence in its brief that a significant number of employers besides Lockheed are exchanging pension trust assets for general releases. Because this case is here on a Rule 12(b)(6) motion, Lockheed has not introduced any evidence in the district court either.

II. The Reduction of Spink's Benefit Accruals Violates the Rule in OBRA Sections 9201 and 9202 Against Limiting the Years of Service or Participation Taken into Account in Determining Pension Benefit Accrual on the Basis of an Employee's Attainment of Any Age

Congress enacted the pension provisions of OBRA, P.L. 99-509, §§ 9201-9204, in 1986 to protect older workers from arbitrary discrimination under private pension plans on account of having attained older ages. Before OBRA, Lockheed maintained a provision in the pension plan that on its face excluded employees like Paul Spink from pension plan participation who were hired after a certain age -- which was age 60. Unlike the other design specialists with whom he worked, including some who were just a few years younger than him, Spink would not be paid pension benefits as part of his compensation because of his age. The Lockheed pension plan as in effect on January 1, 1979 provided that:

> Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older.[21]

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[21] JA 58. Before OBRA, the Department of Labor ruled that exclusions like this did not violate the ADEA so long as they were non-discretionary. 29 C.F.R. 1625.10(c). Lockheed's exclusion may not have been non-discretionary since Lockheed made exceptions to it for "special groups" of employees in Section 15 of the Plan document. The exclusion was not "equally applied to all employees of the same age." *Id.*

OBRA's reforms for all older workers became effective with the first "plan year" beginning on or after January 1, 1988.[22] Since Lockheed employed Paul Spink in a "covered group" of employees[23] and he was not otherwise ineligible, OBRA required Lockheed to make Paul Spink a plan participant. The plan year for Lockheed's pension plan begins on December 25th of each calendar year. Thus, the OBRA amendments became effective for Lockheed's employees who had an hour of service on or after December 25, 1988.

Although OBRA became effective on December 25, 1988, Lockheed did not adopt the amendments to conform its pension plan with the law until December 17, 1990, nearly two years after OBRA became effective. JA 38-39 and 42. Lockheed's December 17, 1990 amendment complied with OBRA by formally eliminating the plan provision that excluded older employees like Spink from plan participation. The Plan as amended December 17, 1990 provides:

> An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988....

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[22] Under ERISA, the "plan year" is like a corporation's fiscal year; it is the "calendar, policy, or fiscal year on which the records of the plan are kept." 29 U.S.C. § 1002(39).

[23] A "covered group" means, in pertinent part, all employees who are compensated by Lockheed on a salaried basis for employment in the United States. Lockheed Plan § 1.09.

A. Lockheed's Refusal to Credit Pre-December 25, 1988 Service to Spink Violates the OBRA Rules on Limiting Accrual Credits Based on Age

In its 1990 amendments, Lockheed included an additional clause that no party contends OBRA required, and that Spink contends violates OBRA (Lockheed contends OBRA permits or tolerates the amendment). This amendment added:

> An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 .. shall not receive Credited Service [under the benefit accrual formula in Section 6] for his pre-Member service.

This is the part of the amendment at issue in this case.

In calculating the amount of an employee's pension benefits, Lockheed "in general" only counts periods of Member service. JA 42-43. But this generalization does not reveal two details. First, the only years of service within a "covered group" that Lockheed does not count as Member service appear to be those of Paul Spink and employees like him who were hired after age 60. *Id.* Second, Lockheed actually credits years other than those worked as a Member in the Plan in calculating benefit accruals in some cases. In fact, Lockheed even goes so far as to count some years when employees were not employed. The most notable examples are its voluntary and special early retirement plans adopted just months before the December 17, 1990 amendment: Under those early retirement incentive plans, Lockheed counts three extra years of credited service when employees were neither Members of the Plan nor even employees. JA 51-52 and 56. Lockheed also counts years of service when the individual was not a Member of the Plan under

Section 15.01 and under Section 4.03 of the Plan document.[24]

Spink contends that the amendment violates OBRA because it singles him out for reduction in the rate of his benefit accruals on account of his attainment of a certain age.[25] OBRA Sections 9201 and 9202 mandate that a pension plan may not reduce an employee's rate of benefit accrual on account of the attainment of any age.

The Ninth Circuit held, in this case of first impression, that denying an employee credited years for benefit accruals on the basis of a prior age-based exclusion reduces the rate of benefit accruals for that employee on the basis of the attainment of a certain age. The Ninth Circuit applied *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and held that it only needed to reach the first step of the *Landgraf* model because "Congress has expressly prescribed the statute's proper reach," *Landgraf* at 1505, when it "manifested," in the statutory text, the act's structure and the legislative history, the "intention that pre-enactment service years be included in calculating benefit accrual for older employees" like Spink. JA 82 and 86. The Ninth Circuit found in particular that the statutory provision on the effectiveness of Sections 9201 and 9202 made the rule

[24] Section 1.28(D) of the Lockheed Plan provides that rules crediting an employee with service for periods when he is not working are to be applied "in a nondiscriminatory fashion to all Employees."

[25] Spink also contends that Lockheed's amendment is not applicable to him for a reason that is not currently before the Court: Spink was promised he would receive benefits for those years when he was hired away from Hughes Aircraft in 1979. For the first four years of his employment, Lockheed gave Spink benefit statements showing credits under the pension plan. JA 78.

against discrimination in benefit accrual effective for "employees who have 1 hour of service in any plan year to which the amendments apply," whereas the provision on exclusion from participation in Section 9203(a) was effective "only with respect to service performed on or after [the effective date]."

B. Lockheed's Defense Would Remove the Protection in OBRA Sections 9201 and 9202 Against Limiting Accrual Credits on the Basis of Age

Lockheed now asks this Court to reverse the Ninth Circuit's decision and rule that OBRA Sections 9201 and 9202 do not prohibit the reduced rate of benefit accrual for Spink on account of his attainment of age 60. Lockheed offers three principal arguments that NELA addresses sequentially. It is important to point out first, however, that Lockheed appears to concede now that the benefit accrual rules in OBRA Sections 9201 and 9202 "apply to all years of service (including years of service before January 1, 1988) completed by a participant ... who has at least 1 hour of service ... in a plan year ... beginning ... after January 1, 1988." Br. at 44 (quoting IRS Notice 88-126, 1988-2 C.B. 538, with approval and stating that Lockheed has "relied" on it). What Lockheed contends is (1) that Spink's cause of action is not under those sections, but only under OBRA Section 9203(a), or (2) that if it is under those sections, Congress intended an exception to the retroactive application of Sections 9201 and 9202 for older employees like Spink who were hired after the age of 60, even if the statutory text does not manifest that distinction.

To advance its arguments, Lockheed first contends that a reduction in the "rate" of benefit accrual under OBRA Sections 9201 and 9202 is limited to a direct reduction in a

percentage rate, e.g., OBRA only applies if the 1-1/2 percent element in § 6.01A of its Plan is reduced to 1 percent for all years of credited service. This argument is easily rebutted. Before and after OBRA, ERISA prescribed limits on an employer's ability to vary a pension plan's "annual rate" for service in different years. ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), provides that the "annual rate" of benefit accrual for service in a later year may not be more than 133 1/3 percent of the annual rate for any earlier year. This rule is directed at plans that apply different annual rates of accrual to different years, either directly or indirectly. *See also* H. Conf. Rep. 1280, 93d Cong. 2d Sess., 275, 3 ERISA Leg. Hist. 4541. A benefit formula that produces "virtually no benefit" for an employee's service in the early period of employment because of an offset of other benefits violates this rule, even though the nominal percentage rate (2.4 percent of pay in this Ruling) is the same for all employees. Rev. Rul. 78-252, 1978-1 C.B. 123.[26]

The succeeding subsection of OBRA provides, moreover, that an employee's rate of benefit accrual is not considered to be reduced "solely because the plan imposes" a "limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan" as long as the limitation is "without regard to age." OBRA Sections 9201 and 9202. This exception would not have been necessary if Congress intended that a limitation on years of service that is based on age could not be considered a reduction in the rate of benefit accruals.

[26] In *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir. 1992), the Seventh Circuit also held that a change in a plan's compensation definition can reduce the rate of future benefit accrual in violation of ERISA Section 204(h).

Thus, offering a lower annual rate of benefit accrual for service in certain plan years is precisely the kind of reduced rate of benefit accruals that ERISA and OBRA contemplate and cover. For an employee like Spink, Lockheed's annual rate of benefit accrual is, pursuant to Lockheed's 1990 amendment, 1-1/2 percent of his "excess" salary for his service after 1988, but zero percent of his salary for his service in plan years before 1988. This is a reduced rate of benefit accrual on account of the attainment of a certain age.[27] It is a reduction in the rate of benefit accrual because it limits "the number of years of service ... which are taken into account for purposes of determining benefit accrual under the plan" on the basis of Spink's age when hired. As a result, the Ninth Circuit found that "Spink's credited service was calculated as lower than that of a younger employee's because [Spink] was denied credit for all years of his employment in a Covered Group" and held that "[s]uch an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions." JA 83.

Lockheed's second argument is that the December 17, 1990 amendment could not have "reduced" Spink's rate of benefit accrual for his years of service before 1988 since he was not a Member of the Plan before December 25, 1988. In syllogistic terms, Lockheed and its amici advance the following argument: Spink was not a "participant" until OBRA took effect in 1988. ERISA computes accrued benefits based only on "years of participation." Spink can only have "years of participation" after he became a participant. Therefore, it follows that

[27] In Rev. Rul. 78-252, *supra*, a formula that produced "virtually no benefit" for the first 25 years of service and greater benefits for service thereafter provided a differential in the "annual rate" of benefit accrual that violated ERISA.

his rate of benefit accrual could not have been reduced by the amendment. Lockheed Br. at 34; Chamber Br. at 23..

This argument has several faults. First, accepting it defeats the Congressional goal of stopping discrimination in pension plans based on the attainment of older ages. The most telling flaw in Lockheed's argument that Sections 9201 and 9202 do not apply is shown by an example: Suppose that in 1988 an employer like Lockheed stopped excluding employees like Spink who were hired after the age of 60 from its pension plan. It has now been ten years since OBRA was enacted. What OBRA sections prevent the employer from deciding to count only the employee's years after age 60 to determine benefit accruals under the plan? NELA respectfully submits that the answer is only OBRA Sections 9201 and 9202, the sections that prevent an employer from limiting credit for years of service on the basis of age. This confirms that Spink looks to the proper OBRA sections to correct his benefit accruals.

Lockheed's syllogism also rests on erroneous premises (1) that OBRA's protection of older workers against reductions in the rate of benefit accruals is limited to the rate of accrual for "years of participation" instead of the rate of accrual for any "years of service ... which are taken into account for purposes of determining benefit accrual under the plan"; and (2) that Lockheed counts only "years of participation" in computing accrued benefits. First, OBRA Sections 9201 and 9202 expressly recognize that plans compute benefits based on both years of service and years of participation. These sections provide that a plan shall not be treated as reducing the rate of an employee's benefit accrual "solely because the plan imposes (without regard to age) ... a limitation on the number of years of service or years of participation which are taken into account for

purposes of determining benefit accrual under the plan." In the instant case, Spink's rate of benefit accrual was reduced because of a limitation on the number of years of service taken into account for purposes of determining benefit accrual. Lockheed imposed that limitation expressly with regard to his age.

Second, Lockheed's plan, in fact, counts years of "credited service" in computing benefits that were not served as a Member of the Plan (or even as an employee of the company). As mentioned, the most notable examples are in its early retirement incentive provisions where credited service is given for years when the individual was not a member of the Plan. *See* Sections 15.02 and 15.03 of the Plan. Lockheed does not limit years used to compute benefits to years of participation across-the-board. It cannot limit them on the basis of age just for Spink's group.

Lockheed's last argument is that OBRA Section 9203 and the lack of retroactivity in the related effective date in Section 9204(b) would not have their intended effect unless Sections 9201 and 9202 are interpreted to mean that employees who companies had excluded from participation may be denied credited service for years of employment prior to their inclusion. However, Lockheed is merely assuming this intended effect. There is no evidence that Congress possessed this intent. The lack of retroactivity in OBRA Section 9204(b) serves a very important function that the Ninth Circuit's decision preserves. The lack of retroactivity in Section 9204(b) allows a pension plan to start with a 1988 participation date in using the rule in Section 9203(b) on "Delayed Normal Retirement Age for Individuals Commencing Plan Participation Within 5 Years of Attaining Normal Retirement Age." Indeed, Section 9204(b) is headed "Applicability of Amendments Related to Normal

Retirement Age."

In effect, Lockheed asks for an exception to OBRA Sections 9201 and 9202 that would provide that a limit on years of service based on an employee's age when hired will not be considered a reduction in the rate of benefit accrual. The Senate bill provided that the prohibition on age-based reductions in rates of benefit accrual would only apply to accrual computation periods after 1986, but the Conference Committee removed that limitation. H. Conf. Rep. 1012, 99th Cong., 2d Sess., 382, *reprinted in* 1986 U.S.C.C.A.N. 4019, 4027; *see also* 132 Cong. Rec. S13176 (Sept. 19, 1986) (Senate Amendment 2863, §§ 10-12). Lockheed's suggestion that Spink's claim should be considered as if it fell under Section 9203(a) is also contradicted by the text of that Section: Section 9203(a), in contrast to Sections 9201 and 9202, nowhere refers to the rate of benefit accrual or limits on years of service or participation on the basis of age in computing benefit accruals. Accordingly, the Ninth Circuit rejected Lockheed's invitation to carve an exception to OBRA's benefit accrual rules based on the previous wholesale exclusion of older workers. The Ninth Circuit observed that it could not comprehend "any logical reason why Congress would not include a limitation in the immediately preceding subsection [on the effective dates for the benefit accrual standards in Sections 9201 and 9202] which would *directly* limit the application of the benefit accrual standards, but [would] instead include a temporal limitation in § 9204(b), *indirectly* limiting the application of [those] standards." JA 86.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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FOR ARGUMENT

19

No. 95-809

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ENGINEERS AND SCIENTISTS GUILD, LOCKHEED SECTION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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24 pp

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A, **LOCKHEED'S USE OF PLAN ASSETS TO PURCHASE RELEASES WAS A PROHIBITED TRANSACTION**.................... 5

A, **LOCKHEED IS THE ONLY PARTY TO BENEFIT FROM THESE RELEASES** 13

A, **CONGRESS HAS NOT SANCTIONED USE OF PLAN ASSETS TO PURCHASE RELEASES** 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 16

Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) 7

Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983) 9

NLRB v. Katz, 369 U.S. 736 (1962) 15

Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987) 7

M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982) 7

United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982) 11

STATUTES

Age Discrimination in Employment Act

29 U.S.C. § 621 *et seq.* 18

29 U.S.C. § 626 .... 18-19, 20

29 U.S.C. § 626(f)(1)(H) 18-19

TABLE OF AUTHORITIES (continued)

Page

STATUTES (continued)

Employee Retirement Income Security Act of 1974:

29 U.S.C. § 1001 *et seq.* 2

29 U.S.C. § 1002(14)(C) 6, 13

29 U.S.C. § 1053(a)(3)(B) 19-20

29 U.S.C. § 1104(a)(1) 3

29 U.S.C. § 1104(a)(1)(A) 5

29 U.S.C. § 1106 3

29 U.S.C. § 1106(a)(1)(B) 7

29 U.S.C. § 1106(a)(1)(D) 2, 5 8

29 U.S.C. § 1110(a) 9

LEGISLATIVE MATERIALS

H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4639, 4650 11

INTEREST OF THE AMICUS CURIAE

The Engineers and Scientists Guild, Lockheed Section ("the Guild") is a labor organization which represents over 700 engineers and other professional and technical employees of Lockheed Corporation ("Lockheed" or "the Employer"), with whom it has had a collective bargaining relationship for over fifty years. Its present and former members are participants in the single-employer pension plan maintained by Lockheed.

The Guild supports the Respondent on the first question presented, namely, whether a plan may lawfully condition enhanced pension benefits on participants' signing of a release of the plan sponsor's corporate liabilities. As the exclusive bargaining representative for these employees, the Guild is particularly well-suited to address employees' concerns with employer misuse of plan assets. The Guild has, in the past, commenced litigation challenging Lockheed's requirement that employees sign a broad release of any employment claims they might have against Lockheed as a condition of receiving enhanced pension benefits.

SUMMARY OF ARGUMENT

Companies that sponsor pension plans for their employees often treat the funds that have been set aside to pay for those benefits as "their" money, to be used for corporate purposes rather than for the sole and exclusive benefit of plan participants. That is plainly illegal under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq*. While companies may create, amend and terminate pension plans in their own best interests, the assets held in trust by an ongoing pension plan can never be used by or for the benefit of the sponsoring employer. Sections 406(a)(1)(D), 406(b)(1), 29 U.S.C. §§ 1106(a)(1)(D), 1106(b)(1).

More particularly, employers may not use pension plan assets to obtain releases of corporate liabilities from employees by requiring such releases as a condition of receiving benefits. Such releases provide no benefit whatsoever to plan participants; on the contrary, the only party that receives any benefit from such releases is the employer. Such use of plan assets for the benefit of a

sponsoring employer is a "prohibited transaction" under Section 406 of ERISA, 29 U.S.C. § 1106, not to mention a violation of the plan's trustees' fiduciary duty to use plan assets for the exclusive benefit of participants and beneficiaries under Section 404(a)(1)(A) of ERISA, 29 U.S.C. §§ 1104(a)(1)(A).1/ While an employer is free to use its own funds to obtain these releases, ERISA does not permit it to purchase them with plan assets.

Lockheed and the *amici* supporting it claim, however, that it has the right to use plan assets to purchase releases from its employees because it was not acting as a fiduciary when it amended the Plan. Therefore, so the argument goes, Lockheed can direct the trustees to use these funds—which they hold in trust for plan participants—for its, not the participants', benefit, even though it would be a prohibited transaction for the trustees to do this on their own initiative.

1/ This issue may not be before the Court, since Lockheed has not asked this Court to review whether the plan's trustees violated their fiduciary duties by requiring a release of Lockheed's corporate liabilities as a condition of benefits. This brief raises this issue in order to address the issues raised by Lockheed in a more comprehensive manner.

Merely restating Lockheed's argument shows why it must be rejected. Use of plan assets for the benefit of sponsoring employers is a *per se* violation of the trustees' fiduciary duties. It is irrelevant, as far as ERISA is concerned, whether the trustees used these assets for Lockheed's benefit on their own initiative or because Lockheed's amendment to the Plan required it. The plan fiduciaries' duty to administer the plan solely for the benefit of participants and fiduciaries under Section 404(a)(1)(A) prohibits this use of plan assets.

Lockheed and *amici* also claim that the Ninth Circuit's decision would effectively outlaw early retirement programs and would interfere with employers' ability to provide enhanced pension benefits, either unilaterally or through collective bargaining. These exaggerated claims simply fall apart on closer inspection.

The Ninth Circuit's decision was correct. It should be affirmed for all the reasons set forth below.

ARGUMENT

A. LOCKHEED'S USE OF PLAN ASSETS TO PURCHASE RELEASES WAS A PROHIBITED TRANSACTION.

The plan's trustees have breached their fiduciary duty to administer the plan solely for the benefit of participants and beneficiaries under Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A), and engaged in a prohibited transaction in violation of Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) by requiring employees to execute a release of claims against Lockheed as a condition of receiving early retirement benefits. Section 406 provides, in pertinent part:

> Except as provided in Section 1108 . . . [a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. . . .

As the employer who has sponsored this pension plan, Lockheed is a "party in interest" within the meaning of Section 3(14)(C) of ERISA, 29 U.S.C. § 1002(14)(C). By using plan assets to purchase these releases, the trustees permitted the use of plan assets "by or for the benefit of" Lockheed. That is a *per se* violation of ERISA.

Lockheed and *amici* argue, however, (1) that the trustees whom Lockheed appointed were not acting as fiduciaries in requiring these releases as a condition of early retirement benefits, since they were merely following the terms of the plan, rather than exercising their own discretion, and (2) that the use of plan assets for Lockheed's benefit is therefore not a prohibited transaction. That argument is illogical and wrong.

When Congress prohibited transactions in which plan assets were used by or for the benefit of sponsoring employers, it did not draw a distinction between those transactions which the trustees initiated and those provided for by the plan documents themselves. While the common law required proof that the third party's relationship with

the fiduciary might influence the best judgment of the fiduciary, Congress instead imposed an absolute rule that defines by statute those persons ("parties in interest") who are deemed to have such an influence. Congress made all such transactions a *per se* violation of ERISA, without regard for either the trustees' state of mind or their reasons for engaging in this sort of transaction.[2/] Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1213 (2d Cir. 1987); Donovan v. Cunningham, 716 F.2d 1455, 1464-1465 (5th Cir. 1983); M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982). Lockheed's distinction between trustee-initiated prohibited transactions and prohibited transactions required by the plan documents has no statutory basis.

2/ An example shows why it is irrelevant whether the transaction was initiated by the trustees or by the party in interest itself. Assume a corporate sponsor passed a plan amendment requiring the plan to lend it money. The trustees' implementation of such amendments would be a violation of Section 406(a)(1)(B) of ERISA, 29 U.S.C. § 1106(a)(1)(B), regardless whether they initiated or merely implemented the deal. M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982).

Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D) states this explicitly:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . .
>
> (D) in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.*

(emphasis added) Congress could not have stated this any more directly: trustees' fiduciary duties and the specific prohibitions imposed by ERISA prevail over any contrary requirements created by the plan documents. Lockheed's argument that the trustees were free to engage in prohibited transactions because the plan required it is completely untenable.

What is more, Congress expressly rejected the notion that trustees can defend their participation in prohibited transactions on the ground that they were merely following

the instructions of the sponsoring employer. Section 510(a) of ERISA, 29 U.S.C. § 1110(a), provides that any agreement purporting to relieve a fiduciary from responsibility or liability with respect to any duty or obligation under Part I of ERISA is void as against public policy.

In voiding such agreements, Congress rejected the common law doctrine that permitted settlors to excuse trustees' breaches of their fiduciary duties. Donovan v. Mazzola, 716 F.2d 1226, 1239 (9th Cir. 1983). As the House Education and Labor Committee noted, employee benefit funds are very different from traditional trusts and require different restrictions on both trustees and sponsoring employers:

> [R]eliance on conventional trust law is often insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of

persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4639, 4650.

If sponsoring employers cannot excuse trustees' breach of their fiduciary duties, then *a fortiori* they cannot direct them to breach those duties. Lockheed's claim that a prohibited transaction somehow stopped being prohibited because the plan documents required it is completely wrong as a matter of law.

This Court, moreover, rejected any distinction between breaches initiated by plan trustees and those called for by plan documents in United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982), the one case in which this Court might have been expected to recognize such a distinction, if one existed. On the contrary, the Court made it clear that, while trustees were expected to follow the terms of plan documents, that did not give them the power to take actions that ERISA plainly prohibited. As the Court noted:

> *Absent conflict with federal law*, then, the trustees breached no fiduciary duties in

> administering the 1950 Benefit trust in accordance with the terms established in the 1974 collective-bargaining agreement. . . . *The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA.* (emphasis added)

Id. at 574, 575. The amendment's authorization of use of plan assets to purchase releases of Lockheed's corporate liabilities is just such a conflict.

Lockheed had no right to require the trustees to use plan assets for its benefit. The trustees had no power to do so. Lockheed's argument that the trustees did not breach their fiduciary duties by participating in a prohibited transaction simply because it was required by plan documents is plainly wrong and should be rejected.

B. LOCKHEED IS THE ONLY PARTY TO BENEFIT FROM THESE RELEASES.

Lockheed does not deny that it is a party in interest within the meaning of Section 3(14)(C). Lockheed and its *amici* claim, however, that it did not draw any more than an incidental benefit from this plan amendment and that the real beneficiaries were the plan participants, who received enhanced pension benefits as a result. This argument is pure sophistry.

The issue in this case is not whether Lockheed has the right to provide enhanced benefits for plan participants out of plan assets, as Lockheed sometimes appears to claim. (Brief at 18-19) No one disputes that Lockheed has that right and no one has tried to stop it from exercising it.

On the contrary, the issue that is actually in dispute in this case is whether Lockheed can condition receipt of those benefits on the giving of a release—a condition that provides absolutely no benefit whatsoever to the plan, the participants or their beneficiaries, but which does convey a substantial benefit to Lockheed at participants' expense.

That condition confers a direct, rather than incidental, benefit to Lockheed.

Lockheed and *amici* insist, on the other hand, that this use of plan assets to purchase releases is not only lawful, but part of the ordinary give-and-take of labor relations, in which employers adjust their compensation packages by offering improved benefits in one area while reducing them in others. According to Lockheed, the Ninth Circuit's decision would prevent employers from ever negotiating a contract that provided both enhanced pension benefits and lower wages, since they could be charged with using plan assets to buy the union's agreement to the wage reduction. (Brief at 27)

Lockheed's exaggerated fears are completely baseless. First, the Court of Appeals does not suggest anywhere in its decision that an employer would engage in a prohibited transaction by reducing wages while increasing benefits. On the contrary, its decision is carefully limited to the particular facts before it; when the Court did resort to a hypothetical example to illustrate its point, the facts it chose

(buying releases with a check drawn on plan funds) do not bear even a faint resemblance to the extreme position that Lockheed claims it is taking. Lockheed has chosen to attack a straw man of its own creation.

Further, the Ninth Circuit's decision simply cannot be stretched, no matter how hard Lockheed tries, to reach this extreme result. The example that Lockheed uses in its argument serves to illustrate the point.

Lockheed claims that the Ninth Circuit's decision would make it unlawful for an employer to require employees to accept wage cuts as a condition of enhanced pension benefits. But there is a significant difference between the wage cut in Lockheed's hypothetical and the releases that Lockheed demanded in this case. An employer whose employees are not represented by a union can lower employees' wages at will, without any need for employees' consent. A unionized employer can do the same, either by obtaining the union's agreement or by changing employees' wages unilaterally after bargaining to impasse with the union. NLRB v. Katz, 369 U.S. 736 (1962). The employer

does not need employees' agreement to these wage cuts in either case.

Furthermore, if an employer does succeed in winning wage cuts by offering enhanced pension benefits, it does not need to call upon the plan fiduciaries to enforce its bargain. In that case, the plan administrators' only responsibility would be to pay whatever enhanced benefits the employer agreed to; any wage cuts, on the other hand, would be a matter of personnel, not plan, administration and no concern of the trustees. In this case, by contrast, Lockheed can only obtain these releases by directing the plan to withhold these benefits from those who refuse to surrender their rights.

Those rights are, moreover, individual, rather than collective. No employee can waive any other employee's right to sue their employer for sexual harassment or assault or any of the other tort and statutory claims that Lockheed's waiver would have extinguished. Nor can the Union. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974). The only way that Lockheed can obtain these releases is to purchase them from individual employees.

It is, of course, free to do so, so long as it uses its own money to purchase them. It has no right, on the other hand, to use its and the plan's fiduciaries' control over participants' and retirees' benefits as leverage to purchase these releases.

The Ninth Circuit's decision bars employers from using plan assets to acquire rights or benefits that they could only obtain by bargaining directly with individual workers. It does not, on the other hand, bar employers from negotiating with unions to raise benefits, even if they obtain lower wages or other concessions in the bargain. Lockheed's alarmist predictions about the end of early retirement programs or the threat to the institution of collective bargaining only serve to underscore just how weak its substantive arguments are.

C. CONGRESS HAS NOT SANCTIONED USE OF PLAN ASSETS TO PURCHASE RELEASES.

Finally, Lockheed argues that Congress implicitly endorsed use of plan assets to buy employee waivers when

it amended the Age Discrimination in Employment Act ("the ADEA"), 29 U.S.C. § 621 *et seq.* by the Older Workers Benefits Protection Act ("the OWBPA"), 29 U.S.C. § 626. The language of the OWBPA simply will not support this claim.

Section 626(f) establishes a detailed and exacting set of requirements which any employer seeking to obtain a waiver of ADEA claims must meet. That section provides:

> (H) if a waiver is requested in connection with an exit incentive program or other employment termination program offered to a group or class of employees, the employer [must] . . . inform . . . the individual in writing in a manner calculated by the average individual eligible to participate, as to—
>
> (i) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Lockheed argues that this language is an implicit authorization for it to require employees to sacrifice their ADEA and other claims as a condition of receiving benefits under the plan.

That argument simply will not hold water. While Section 626 dictates in great detail the means by which employers may obtain waivers, it says nothing about the content of those waivers, much less the source of the funds which the employer uses to obtain them.

In fact, where Congress has allowed employers to place conditions on employees' receipt of benefits it has done so directly, in language that speaks to the content of those restrictions, not the method by which they are obtained. *See, e.g.*, Section 203(a)(3)(B), 29 U.S.C.

§ 1053(a)(3)(B) (plans may suspend benefits to employees who return to work for employer or in industry). There is nothing in Section 626, by contrast, that even suggests that Congress meant to authorize the sort of conditions that Lockheed imposed in this case. Lockheed's arguments, no doubt unintentionally, only illustrate that much more clearly why the Ninth Circuit's decision should be upheld.

CONCLUSION

For all the reasons set forth above, Amicus Curiae Engineers and Scientists Guild, Lockheed Section urges that the Ninth Circuit's decision be affirmed.

DATED: March 26, 1996

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